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No.

IN THE

# Supreme Court of the United States

MARY JO SLICK, SHARON GRIFFITH, OSNABURG LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, BOARD MEMBERS DAVID A. HAUBERT, PHIL A. BUSHEY, FRANCIS AQUINO, BETSY KETCHUM, REED C. VARIAN and GEORGE McGUIRE, SUPERINTENDENT,

*Petitioners,*

*v.*

JOHN R. McINTOSH,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO STATE SUPREME COURT

## PETITION FOR A WRIT OF CERTIORARI

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*Phil A. Busbey; Francis Aquino;*
*Betsy Ketchum; Reed C. Varian*
*and Superintendent George McGuire*

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of the State of Ohio erred in concluding that public high school principals are never "public officials" for purposes of defamation law.

2. Whether the Supreme Court of the State of Ohio erred in concluding that Respondent McIntosh, a public high school principal, was not a public figure for purposes of his defamation claim against Petitioners.

3. Whether the Supreme Court of the State of Ohio erred by refusing to acknowledge that the individual Petitioners could not be held individually liable in this defamation action in light of: (1) their statutory immunity; and (2) the absence of any demonstration of malice.

## PARTIES TO THE PROCEEDING IN THE OHIO SUPREME COURT

**East Canton Education Association**
**Ohio Education Association**
**Mary Jo Slick**
**Sharon Griffith***

**Osnaburg Local School District Board of Education**
**Individual Board Members: David D. Haubert; Phil A. Busbey; Francis Aquino; Betsy Ketchum; Reed C. Varian**
**Superintendent George McGuire****

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* While this matter was pending before the Supreme Court of Ohio, Respondent dismissed his claims against the East Canton Education Association and the Ohio Education Association.

** The individual Board Members named as Defendants in this litigation are no longer serving Board Members. Each has chosen not to seek re-election and/or has been defeated in an attempt at re-election. Superintendent McGuire has resigned and is employed in another school district. However, this action survives as it relates to each of them.

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The Petitioners, Mary Jo Slick, Sharon Griffith, Osnaburg Local School District Board of Education, Board Members David D. Haubert, Phil A. Bushey, Francis Aquino, Betsy Ketchum, Reed C. Varian and Superintendent George McGuire, respectfully pray that a writ of certiorari issue to review the judgment issued by the Supreme Court of the State of Ohio on May 19, 1999.

## OPINIONS BELOW

There has been no official report of the opinions issued by the Fifth Judicial District Court of Appeals. The judgment of the Ohio Supreme Court is cited at 85 Ohio St. 3d 465 (1999).

The original interlocutory decision, in which the federal immunity issue and Respondents claims against the Association, Slick and Griffith were originally decided, was rendered by the Stark County Common Pleas Court on August 22, 1996 (Appendix F). The final decisions of the Stark County Common Pleas Court were rendered on January 23, 1997 (Appendix D and E).

The first Opinion and Judgment Entry of the Fifth Judicial District Court of Appeals was filed on August 18, 1997 (Appendix C). The next Opinion and Judgment Entry of the Fifth Judicial District Court of Appeals was filed on March 16, 1998 (Appendix B). The Opinion and Judgment Entry of the Ohio Supreme Court was filed May 19, 1999 (Appendix A).

## STATEMENT OF JURISDICTION

The Opinion and Entry sought to be reviewed was rendered May 19, 1999. Petitioners' subsequent Motion for Reconsideration was decided by the Ohio Supreme Court on June 30, 1999 (Appendix G). This Court has jurisdiction under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the First and Fourteenth Amendments to the U.S. Constitution and 29 U.S.C. § 185(b). The relevant portions are in Appendix H.

## STATEMENT OF THE CASE

This case arises from the contract termination/non-renewal of Respondent John R. McIntosh, Principal of East Canton High School, by the Osnaburg Local School District Board of Education ("Board"). In February, 1995, Respondent met with the Board to discuss his employment status for the following school year. The Board informed Respondent that it intended not to renew his administrative contract, which was scheduled to expire on July 31, 1995, and proposed that Respondent resign his position as principal. There was also a discussion between Respondent and the Stark County Superintendent regarding a new position for Respondent as a consultant for the Stark County Board of Education. Respondent refused to resign and he declined the offer of a position with the Stark County Board of Education.

When Respondent advised the Board during the February, 1995, meeting that he did not intend to resign and accept the position with the Stark County Board of Education, an Osnaburg Board member, Betsy Ketchum, stated to him that he was "going to tear the district apart and bring it to its knees." Another Board member, David Haubert, stated to Respondent, that "We are your boss, not [superintendent] Dr. McGuire" to which Respondent proclaimed: "You're not my boss; I work for the residents of Osnaburg Township." Respondent further announced to the Board that it was obligated to re-employ him in the Fall as a teacher if it chose to nonrenew his administrator's contract as high school principal.

When it became apparent that Respondent would not resign at the end of his contract as principal, the Board considered a recommendation by the Superintendent to nonrenew his contract as principal. Written notice of the Board's intention to nonrenew a principal's contract must be given by March 31. On March 1, 1995, a letter was sent to Respondent advising him of his right to request a meeting with the Board to discuss, in executive session, the reasons for considering the renewal or nonrenewal of his contract. The meeting was scheduled for March 13, 1995.

In early March 1995, when the Board's intent not to reemploy Respondent was published by the media, some high school students began wearing "Keep Mac" ribbons in school. Respondent did nothing to discourage this practice. In fact, Respondent permitted members of the media to enter the high school during school hours to interview and photograph students who were wearing those ribbons.[1]

Respondent told the media that teachers, not he, were responsible for disciplinary problems in the high school. Specifically, on March 8, 1995, Respondent was quoted in the Canton Repository, a local newspaper of general circulation, as stating that "[d]iscipline begins in the classroom. . . . The primary problem has been some of the weaker faculty members, and I've put heat on them."

On March 9, 1995, there was significant student turmoil at the high school as a result of the Board's proposed termination of McIntosh. At one point, Respondent permitted a newspaper reporter and photographer to access the high school for a story. Respondent also asked a teacher to leave her classroom so that students could be photographed.

Although the superintendent was out of his office on March 9, 1995, his secretary called him to advise that she was very concerned about student unrest. Rumors had been swirling about walkouts and sit-ins. Superintendent McGuire personally spoke to the intermediate school principal and confirmed that a student walkout appeared imminent.

Teachers described the general atmosphere at the high school as "disrespectful" and "disruptive." During class time, students were making protest signs and banners. Some students walked out of their classrooms without permission to seek out

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1. Prior to these events and during Respondent's employment with the Board, the local media regularly reported on McIntosh's activities as high school principal. Respondent was quoted in many newspapers and was sought out as a public official for information about the high school. Respondent routinely addressed community organizations at least five or six times a year.

the newspaper reporter that had been seen in the building. Respondent gathered students together in the hallway and had them pose for the newspaper photographer. At the end of the school day, the superintendent assigned Respondent to his home. On March 10, 1995, over one hundred (100) students boycotted the high school. By the end of the day, there were only fifty (50) or sixty (60) students, out of 320, in class. Outside the building, students and parents were picketing and chanting. On March 11, 1995, there was an increase in the number of student absences and pickets outside the high school.

On March 10, the Superintendent and another school employee hand-delivered a letter to Respondent, at his home. The letter advised that the Superintendent intended to recommend to the Board that it suspend and/or terminate Respondent's teaching/administrative contracts and referred to the statutory grounds for such action found in Ohio Revised Code Section 3319.16.[2] At this same time, a newspaper reporter, a photographer and a personal friend of Respondent were present in Respondent's home. The letter which the superintendent delivered was shown by Respondent to the reporter and Respondent's friend. That same letter was described in detail by the reporter in a newspaper article the following day. Accompanying the article was a photograph of the superintendent delivering the letter to Respondent. The photograph was taken from inside Respondent's home.

The March 13, 1995, meeting scheduled by the Board was to be a private, non-public special meeting. Respondent, however, demanded that the meeting be held in public. Since Respondent had mustered hundreds of people to attend, the meeting's situs was changed to a hall that would accommodate all of his supporters.

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2. Respondent later claimed that the letter was defamatory because it cited the statutory grounds for termination, including terms such as "immorality" and "gross inefficiency".

Also on March 10, 1995, members of the East Canton Education Association[3] met and voted to authorize their representatives to issue a position statement addressing Respondent's actions, and the events which had occurred in the district over the last several days. Members of the Association were concerned that Respondent was using the media to make scapegoats of high school teachers (members of the Association), and to intimidate the Board regarding his employment — rather than following proper procedures to challenge his employment termination under Ohio law. A statement outlining the views of the Association was written by Petitioner Slick and was read by Petitioner Griffith before the Board at the March 13, 1995 meeting.[4]

At the March 13 meeting, the Board adjourned to executive session with McIntosh and his attorney to discuss the renewal of his principal's contract and his suspension without pay pending termination of his contract. Respondent's counsel requested that this discussion be held in public. The Board opted to remain in executive session, as permitted under Ohio Revised Code Section 122.22(G)(1). After their executive session deliberations, the Board members returned to public session and voted to nonrenew Respondent's contract, to initiate the statutory process to consider termination of his principal's contract, and to suspend Respondent pending those termination

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3. The East Canton Education Association ("Association") is an employee organization, as defined by the Ohio Public Employees Collective Bargaining Act, and is the exclusive representative for the certificated teaching employees in the Osnaburg Local School District. Petitioner Sharon Griffith was the Association's President. The Association is an affiliate of the Ohio Education Association ("OEA"). The OEA provides various local associations with labor relations consultants. Petitioner Slick was a Labor Relations Consultant for the OEA and worked extensively with the Association by providing assistance and support during collective bargaining.

4. The statement delivered by the Association and their representatives at the March 13, 1995, Board meeting is reproduced at Appendix page 4a.

proceedings. Those in attendance at the meeting became loud, contentious and unruly. Several members of the public screamed their opposition to the Board's decision. One Board member even resigned rather than vote on the issue.

On March 17, 1995, Respondent filed a complaint in the Stark County Court of Common Pleas against the Board, its individual members and Superintendent McGuire, claiming that, under State law, he was entitled to continuing contract status as a teacher with the Board. Respondent also alleged that the grounds for his termination, as stated by the superintendent and the Board, were defamatory.

Because of Respondent's complaints that the March 13th meeting should have been held in public, rather than in executive session, the Board chose to hold a second meeting on March 20, 1995. At that meeting, the Board discussed Respondent's employment status in public and then took action to nonrenew his principal's contract and to suspend Respondent pending the completion of proceedings to terminate his present contract. Respondent's litigation remained pending for several months.

On December 22, 1995, the Association initiated a declaratory judgment action in the Stark County Common Pleas Court, seeking a determination as to whether Respondent had achieved continuing service status (i.e., tenure) as a teacher in the Osnaburg Local School District, thereby entitling him to all the rights and privileges of a member of the bargaining unit represented by the Association. In response to the Association's declaratory judgment action, Respondent asserted counterclaims against the Association and a Third-Party Complaint against the OEA and Petitioners Slick and Griffith, which included, among others, defamation claims for the position statement delivered by the Association at the March 13th Board meeting.

On August 22, 1996, the trial court rendered summary judgment in favor of Petitioners as to Respondent's third-party claims and counterclaims for defamation. The trial court held that Petitioners Slick and Griffith were not personally liable to

Respondent for any actions taken on behalf of the Association and the OEA, that Respondent was a public figure and that the statement prepared by Petitioner Slick and read by Petitioner Griffith at the Board meeting did not contain defamatory language. Moreover, Respondent had alleged no facts to support a finding of malice. The original declaratory judgment issue, *i.e.* McIntosh's claimed status as a tenured teacher, remained to be decided. Thereafter, at Respondent's request, Petitioner's declaratory judgment action was consolidated with Respondent's original defamation action against the Board. A final decision was rendered by the trial court on all of the remaining consolidated claims on January 23, 1997, including the court's finding that the Board, its individual members and superintendent were entitled to summary judgment on Respondent's defamation claims. The court determined that Respondent was a public figure, that he failed to prove that the Board published any defamatory statements, that any publication was done by Respondent himself, and that the Board members enjoyed an absolute privilege for statements made by them in their public meetings.

Respondent appealed the trial court's decision ruling in favor of the Association, Slick and Griffith, on September 20, 1996. The appellate court concluded that: (1) Respondent was not a public official nor public figure for purposes of his defamation claim; (2) that particular sentences, or phrases within the sentences, in Petitioners' statement did not constitute opinion; (3) that there existed an issue of fact as to whether these labor representatives were acting within the scope of their employment such that they would be immune from individual liability as to Respondent's defamation claims; and (4) that Petitioners had failed to establish there was no genuine issue of material fact as to their justification for making the statement so as to support a finding of privilege and, thus, entitle them to judgment on the issue of tortious interference with contract.

Following the January 23, 1997, decision of the trial court in favor of the Board, its individual members and its superintendent on the claims of defamation, Respondent again appealed. The appellate court reversed the trial court decision granting summary judgment and concluded that the prior appellate decision in the defamation case against the Association resolved the issue of whether Respondent was a public official or public figure. The appellate court also ruled that there were issues of fact as to whether the Board, its individual members and the superintendent were entitled to an absolute privilege and whether Respondent was responsible for publication of the materials he claimed to be defamatory.

On December 17, 1997, Petitioners appealed these two appellate decisions to the Supreme Court of Ohio. The Supreme Court allowed review. In its decision, rendered on May 19, 1999, the sharply divided Ohio Supreme Court not only concluded that Respondent was neither a public official or public figure for purposes of his defamation claim, but further held that "*a public school principal is not a public official for purposes of defamation law.*" Two justices, including Chief Justice Moyer, dissented. The State Supreme Court majority refused to address Petitioners' claims to privilege, as well as the individual Petitioner's claims to immunity given their positions as labor organization representatives. As to the defamation claims against the Board, its individual members and superintendent, the State Supreme Court refused to address Petitioners' claims of absolute and/or qualified privilege and the defense that Respondent was responsible for publishing the material he later claimed was defamatory. A motion by Petitioners for reconsideration (rehearing) of these issues was denied by the Ohio Supreme Court on June 30, 1999.

Petitioners respectfully submit that the majority opinion of the Ohio Supreme Court is contrary to this Court's interpretation of the First Amendment as it relates to defamation claims; that the decision raises an issue not previously addressed by this Court; and addresses an issue over which the state courts

are in major disagreement. Accordingly, Petitioners respectfully request a writ of certiorari issue for review by this Court.

## REASONS FOR GRANTING THE WRIT

In accordance with Part III, Rule 10, Section 1 of the Rules of the Supreme Court of the United States, Petitioners maintain that a writ of certiorari to the Ohio Supreme Court for review of the opinion and decision by the Supreme Court of Ohio should issue because: (1) "a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort"; and (2) "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court"; and (3) a state court "has decided a federal question in a way that conflicts with applicable decisions of this Court". *Rules of the Supreme Court of the United States, Part III, Rule 10, Section 1(b) and (c).*

The Ohio Supreme Court's decision in this matter, that a public high school principal can never be a public official for purposes of a defamation claim, effectively undermines the standards established by this Court in *NY Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and *Rosenblatt v. Baer,* 383 U.S. 75, 76, 86 S. Ct. 669, 676, 15 L. Ed. 2d 597, 605 (1966) for determining public official status. The State Supreme Court's decision punishes elected officials and teaching employees who make critical remarks about a high school principal at a public meeting. This decision will have an irreparable chilling effect on the fundamental and revered right of the people to freely and openly speak about matters of public and general concern. The constitutional damage inflicted by this decision is underscored by the State Court's conclusion that Respondent McIntosh, a high school principal who actively sought public and media support to preserve his employment position, was not a public figure for purposes of his defamation action. This conclusion renders this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and its progeny, of no realistic effect.

The Ohio Supreme Court decision — and that of several other state high courts — effectively forecloses a finding of public official status unless the governmental employee has authority to control public policy. *See E. Canton Edn. Assn. v. McIntosh*, 85 Ohio St. 3d 465 (1999), relying on *McCutcheon v. Moran*, 99 Ill. App. 3d 421, 424, 54 Ill. Dec. 913, 425 N.E.2d 1130, 1133 and *Ellerbee v. Mills*, 262 Ga. 516, 517, 422 S.E.2d 539, 540 (1992). The decision of the Georgia Supreme Court is illustrative: "[U]nder normal circumstances, a principal simply does not have the relationship with government to warrant 'public official' status under *New York Times*. Principals, in general, are removed from the general conduct of government and are not policymakers at the level intended by the *New York Times* designation of public official", 262 Ga. 516, 517. Plainly, this Court has never mandated that government employees not be considered public officials unless they are vested with policymaking authority. Such a finding by the Ohio court and the other state courts underscore the need for this Court to address and clarify this issue.[5]

Finally, the State Court's decision conflicts with that recently rendered by the Supreme Court of Vermont, a court of last resort, in *Palmer v. Bennington School District, Inc.*, 159 Vt. 31, 615 A.2d 498 (1992).[6] In *Palmer*, the State Supreme Court specifically held, directly contrary to the Ohio Supreme Court, that a "[p]ublic school principal is [a] public official" for defamation purposes. *Id.* at 37, 615 A.2d at 501-502.

5. The recent epidemic of public school violence has led to nationwide concerns and open discourse over the qualifications and actions of school officials. School principals, who have direct charge of school buildings and those who enter them, are subject to special scrutiny. The need for this Court to address the issue of whether public school authorities can, in fact, be "public officials" for purposes of state defamation laws is compelling.

6. *See also Kapiloff v. Dun*, 27 Md. App. 514, 524, 343 A.2d 251, 258 (1975); *State v. Defley*, 395 So. 2d 759, 761 (La. 1981). *But see McCutcheon v. Moran*, 99 Ill. App. 3d 421, 424, 54 Ill. Dec. 913, 916, 425 N.E.2d 1130, 1133 (1981); *Stevens v. Tillman*, 568 F. Supp. 289, 294 (N.D. Ill. 1983); *Ellerbee, supra*.

In addition to its erroneous evaluation and analysis of the public official and public figure concept in this defamation action, the Ohio Supreme Court erred in refusing to acknowledge that Petitioners Slick and Griffith are immune from liability. By refusing to address this important immunity issue, the State Supreme Court implicitly upheld the appellate court's erroneous conclusion that these individual Petitioners could be subject to liability for defamation if they were not expressly authorized by the teachers Association to make particular statements to the Board. This finding not only ignores those statutory mandates of immunity for labor representatives, it conflicts with decisions of this Court regarding federal labor policy and labor representative discretion. Finally, the decision rejects this Court's directives that actual malice be shown for purposes of defamation liability arising out of labor disputes.

## I. THE OHIO SUPREME COURT ERRED IN CONCLUDING THAT RESPONDENT, A PUBLIC HIGH SCHOOL PRINCIPAL, IS NOT A PUBLIC OFFICIAL FOR PURPOSES OF HIS DEFAMATION CLAIMS.

Since 1964, this Court has consistently and repeatedly recognized "the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times,* 376 U.S. at 270, 84 S. Ct. at 720. This Court has fashioned the:

> [F]ederal rule [applicable to the states in defamation actions which] prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*New York Times* at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706.

In *New York Times*, the Court did not determine "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of [the *New York*

*Times*] rule." *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Two years later, however, the Court did determine that ". . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental offices." *Rosenblatt*, 383 U.S. at 76, 86 S. Ct. at 676, 15 L. Ed. 2d at 605 (1966). According to this Court, the test is whether any given individual holds a "position in government [which] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt* at 86, 86 S. Ct. at 676, 15 L. Ed. 2d at 606.

Contrary to the Ohio State Supreme Court's decision herein, and those states which have similarly held, a public school principal has, and generally is perceived by the public to have, substantial responsibility for and control over the conduct of governmental affairs. State courts holding otherwise, including the Ohio Supreme Court, have refused to acknowledge this reality because public school principals do not always set public policy, or their actions on behalf of individual school districts do not directly impact larger political entities. This rationale, however, is inconsistent with, and severely constrains, the standards mandated by *NY Times* and *Rosenblatt*.[7]

In light of this Court's prior decisions addressing the importance of public education, it cannot be seriously disputed

7. This is not the first time the Ohio Supreme Court has construed this Court's holdings in such manner. In *Lorain Journal Co. v. Milkovich*, 15 Ohio St. 3d 292 (1984), Justice Brennan criticized the Ohio Supreme Court for reading ". . . the language in *Rosenblatt* referring to government employees having 'substantial responsibility for or control over the conduct of government affairs' as restricting the public official designation to officials who set government policy." *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 958, 106 S. Ct. 322, 326, 88 L. Ed. 2d 305 (1985) (Brennan and Marshall, JJ., dissenting).

that the conduct and control of our public schools is a crucial governmental function. In fact, this Court has held that "education is perhaps *the most important function* of state and local governments." *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873 (1954). Moreover, consistent with the *NY Times/Rosenblatt* standards, "the public has an independent interest in the qualifications and performance" of those who manage and govern the public schools that "goes beyond the general public interest in the qualifications and performance of all government employees", not only on a local level, but on a national level is evidenced by the recent school violence uprisings across the nation. The states are in need of direction from this Court regarding the qualifications of public school authorities as public officials for purposes of defamation actions. Petitioners submit that, contrary to the State courts' holdings, "public official" status cannot, and should not, be limited to only those governmental employees that personally set governmental policy.

The Vermont Supreme Court in *Palmer, supra*, correctly recognized that a high school principal must be viewed as a public official "[b]ecause of the crucial role of public education in American society." The court also noted that "compulsory education statute[s] reflect the state's commitment to this essential government function." *Palmer* at 37, 615 A.2d 501-502. Similarly, Chief Justice Moyer, joined by Justice Lundberg Stratton, in dissent in the decision at issue herein, elaborated:

> The naming of a public school principal, particularly a high school principal, is an event widely published and discussed in many communities, as is the conduct of such individuals once they undertake the duties of their position. This is particularly true in small communities the size of East Canton, where only one high school serves the entire community. Principals in such communities are perceived to have significant influence over the schools they administer and are frequently deemed by the members of the

> community to be largely responsible for the educational quality of those schools. In light of the generally held perception that high school principals exercise both responsibility and control over their schools and because the provision of public education is a governmental function, I believe that many, if not all, public school principals will be found to meet the *Rosenblatt* test.

*E. Canton Edn. Assn v. McIntosh* at 480 (C.J. Moyer, dissenting).

The Ohio Supreme Court has previously held that a public school superintendent is a public official for purposes of defamation actions. *See Scott v. The News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). In so doing, the Court implicitly acknowledged that public school administrators are, or are perceived to be, endowed with sufficient authority for purposes of public official status. Notwithstanding this conclusion, and without discussion, the State Supreme Court in this action retreated from that recognition. As the Chief Justice pointed out in dissent, "I cannot, *nor does the majority attempt to*, distinguish a school superintendent from a high school principal for purposes of determining public official status". Chief Justice Moyer continued:

> Both are school administrators. Both are responsible for implementing the policies adopted by a local school board. Both are expected to serve as public role models for students. Both exercise supervisory authority over those who have more direct contact with the children of the community. Many of these individuals assume active roles in the life of their greater communities. As did the superintendent in *Scott*, high school principal McIntosh held a position in the community of East Canton in which "[p]ublic scrutiny of [his] official conduct, as well as those aspects of his private life which relate to his suitability for his position, was an inconvenience which he no doubt endures." *Scott*, 25 Ohio St. 3d

> at 256-257, 25 OBR at 313, 496 N.E.2d at 711 (Douglas, J., concurring). Both school superintendents and principals hold positions which invite public scrutiny and discussion concerning them, based solely on the basis of the positions they hold. Cf. *Rosenblatt,* 383 U.S. at 86-87, 86 S.Ct. at 676, 15 L.Ed.2d at 606, fn. 13.

*E. Canton Edn. Assn.* at 481 (Moyer and Lundberg Stratton, JJ, dissenting).

Unquestionably, the provision of public education is a governmental function. The Ohio Court's implicit conclusion in this case, that sufficient differences exist between public school superintendents and public high school principals so as to remove the latter from public official status, is unjustifiable. A school principal, who has direct contact and control over the school's daily proceedings, quality of education, and management of staff is even more convincingly a "public official" for purposes of defamation law than a superintendent who is only indirectly, and mainly administratively, involved in the daily functioning of the school.

Respondent's contract non-renewal and contract termination by the Board, which spawned widespread and emotional community interest, necessitates a finding that, under the *NY Times/Rosenblatt* standards, high school principals in general, and Respondent in particular, are indeed public officials for purposes of defamation claims even if they are not directly involved with governmental policymaking. For these reasons, including the widespread divergence on the applicability of the *NY Times/Rosenblatt* standards to public school authorities by the various states, Petitioners respectfully submit that this Court's resolution of this issue is critical and essential.

## II. THE OHIO SUPREME COURT ERRED IN CONCLUDING THAT RESPONDENT, A PUBLIC HIGH SCHOOL PRINCIPAL, WAS NOT A PUBLIC FIGURE FOR PURPOSES OF HIS DEFAMATION CLAIMS.

The Supreme Court of Ohio erroneously rejected the trial court's conclusion that the Respondent was a "public figure" for purposes of his defamation claims. The Court's finding was based on the appellate court's commitment to a reinterpretation of the record before the trial court. The following observation by the appellate court is illustrative of its unfaithfulness to the record evidence:

> There is no evidence linking McIntosh to the actions of the students and parents who protested his termination. Nor is there any evidence that McIntosh sought out the media to trumpet his cause. Accordingly, the trial court erred in finding that McIntosh was a pubic figure and requiring that he be held to the *New York Times* standard of proving actual malice.

*E. Canton Edn. Assn., supra*, at 474-475. The appellate court and Supreme Court are wrong. The state courts' analysis requires that public figure status be conferred only when the private individual *deliberately creates* the public controversy. Not only is this legally incorrect, this analysis ignores the record evidence that Respondent did, indeed, trumpet his cause through the media.

The "actual malice" standard established in *NY Times, supra*, was initially extended by this Court to public figures (*i.e.*, non-governmental officials) in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). The opinion consolidated two separate cases for review. While the Court could not reach a consensus on the standard of liability in defamation suits by "public figures", seven members of this Supreme Court agreed that both defamation complainants qualified for such status. As the plurality opinion explained:

> Both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies' of the defamatory statements."

*Butts, supra*, 388 U.S. at 154-155, 87 S. Ct. at 1991. This Court's subsequent decisions addressing the subject of "public figures" have elaborated on the decision in *Butts*. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 1 L. Ed. 2d 789 (1974), this Court reiterated that:

> [i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. * * * More commonly, an individual voluntarily injects himself *or is drawn into* a particular controversy and thereby becomes a public figure for a limited range of issues." *Gertz, supra*, 418 U.S. at 351, 94 S.Ct. at 3013. Overall, a "public figure" is an individual that has "assumed [a] rol[e] of especial prominence in the affairs of society [that] invite[s] attention and comment.

*Id.* at 345, 94 S. Ct. at 3009.

In light of this Court's holdings — even assuming *arguendo* that Respondent was not at all times a public official — he was undoubtedly a public figure at the time the alleged defamation by Petitioners (*i.e.*, the delivery of the statement at the March 13 Board meeting) occurred. Respondent was personally responsible for ensuring that hundreds of community members

were present at that specific Board meeting. As noted by Chief Justice Moyer in his dissent:

> In *ECEA v. McIntosh,* McIntosh asserted that representatives of the school district's teachers' union had defamed him in statements issued to the public on March 13, following a school board discussion of his proposed termination. This discussion occurred in a closed executive session, *despite McIntosh's urgings that the meeting be held in public.*
>
> McIntosh had earlier, in February, been told by the school board, meeting in executive session, that the board was unanimous in its determination that he should be terminated as principal. He was at that time asked to submit his resignation, which he refused to do. Appellants convincingly argue that McIntosh knew that his position could be salvaged only if the greater community demanded it.

*E. Canton Edn. Assn., supra* at 483 (Moyer and Lundberg Stratton, JJ, dissenting) (emphasis in original). Not only had Respondent requested the meeting be held in public, but the situs of the meeting had to be moved to a larger hall to accommodate the number of community members that McIntosh had rallied to attend. In addition, prior to the Petitioners' determination to make any statement whatsoever, Respondent had made statements to the media — in response to the Board's allegations that he had been negligent as to student discipline — that the faculty, not he, was responsible for any disciplinary problems at the school. He had also allowed the media to access the high school for purposes of interviewing and photographing students wearing "Keep Mac" buttons. Finally, Respondent invited the media into his home for purposes of photographing him and preparing additional news articles. As Chief Justice Moyer and Justice Stratton pointedly observed:

> The majority accepts McIntosh's characterization of himself as a private figure as to the controversy that

> erupted thereafter when his proposed firing became publicly known. It reaches this conclusion despite the fact that McIntosh repeatedly met with members of the press, provided them with comments concerning the public debate surrounding his termination, and allowed a reporter and photographer access to his home, where his photograph was taken, and the photograph published in a March 11 article. McIntosh not only was actively involved in the controversy — described in a newspaper editorial as one that "consumed the community" — but also his personal future was at its very center.
>
> The majority accepts the premise that McIntosh remained a private figure, even though he shared the contents of the allegedly defamatory termination notice with a news reporter after receiving it. The majority affords McIntosh the protection provided by private figure status despite the fact that McIntosh spoke with members of the press one day after the meeting at which the allegedly defamatory statement was read by the union's representative, and McIntosh was quoted as saying, "I think I have a responsibility to speak out, share my views and get things rectified."

*E. Canton Edn. Assn., supra,* at 483 (Moyer and Lundberg Stratton, JJ., dissenting).

The Ohio Supreme Court's contention that Respondent was not responsible for creating the public controversy, and therefore not a public figure, is inapposite to this Court's holdings. As this Court has taught, it is the individual's "purposeful activity amounting to a thrusting of his personality" into the "vortex" of such important public controversy which delineates his status as a public figure. Justice Brennan aptly summarized this point in *Lorain Journal Co., supra,* 474 U.S. at 963, 106 S. Ct. at 329:

> [T]he *New York Times* standard is not limited to discussion of individuals who *deliberately* seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-761, 105 S.Ct. 2939, 2943-2946, 86 L.Ed.2d 593 (1985) (opinion of POWELL, J., joined by REHNQUIST and O'CONNOR, JJ), *id*, at 763-764, 105 S.Ct. at 297-2948 (opinion of BURGER, C.J.), *id*. at 777-789, 105 S.Ct. at 2954-2961 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). **Although not every person connected to a public controversy is a "public figure", *Gertz, supra*, the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages**. *See Wolston v. Reader's Digest Assn.*, 443 U.S. at 167, 99 S.Ct., at 2707; *see also Gertz, supra*, 418 U.S. at 351, 94 S.Ct. at 3012 (public figure is one who "voluntarily injects himself or is drawn into a particular public controversy" (emphasis added)).

*Lorain Journal Co., supra*, 474 U.S. at 963, 106 S. Ct. at 329 (emphasis added).

Respondent was the major and primary figure in this matter, a figure around which community controversy raged. Assuming, *arguendo,* that Respondent did not initiate nor deliberately create this controversy, he was, as set forth previously, thoroughly involved in it and voluntarily thrust his personality and opinions regarding this matter into the vortex of the controversy through the media and through his demand for public meetings.

It is beyond question that Respondent "had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the [allegedly]

defamatory statements." *Butts, supra*, 388 U.S. at 154-155, 87 S. Ct. at 1991. Public figures "enjoy significantly greater access to the channels of effective communications" and, as a result, are in a more opportune position to counteract allegedly defamatory statements. Again, even assuming that the State Supreme Court's contention that Respondent did not "seek out" the media "to trumpet his cause", the fact remains that he had more than sufficient access to the media, and he took advantage of that access to counter Petitioners' statements about him. Respondent not only cooperated with the media, he invited its involvement in order to provide himself with a public relations engine. In fact, because of Respondent's numerous interviews with the media and in order to stem the tide of public criticism against the Board over its decision to nonrenew his employment contract, the Board published two open letters to the community to tell its side of the story.[8] Respondent had every right to access and utilize the media in the fashion that he did. In so doing, however, he became a public figure.

## III. THE OHIO SUPREME COURT ERRED IN REFUSING TO ACKNOWLEDGE THAT PETITIONERS SLICK AND GRIFFITH COULD NOT BE HELD INDIVIDUALLY LIABLE FOR RESPONDENT'S DEFAMATION CLAIMS BECAUSE OF THEIR STATUTORY IMMUNITY AS AGENTS FOR THE UNION AND BECAUSE THERE IS NO EVIDENCE OF MALICE ON THEIR PARTS.

While the Ohio Supreme Court allowed review of the Petitioner's appeal in this matter, it ultimately refused to address the issue of whether Petitioners Slick and Griffith were immune from liability for the defamation alleged by Respondent. As a result, the Supreme Court implicitly affirmed the appellate court's finding that these individual Petitioners could be liable for defamation because each and every sentence in the statement they presented to the Board was not explicitly authorized by

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8. Respondent subsequently claimed that he was defamed by these letters.

their union membership. This holding contravenes federal labor policy, as mandated by statute and as developed by this Court. It undermines the statutory immunity for labor representatives mandated by both the federal and Ohio legislatures. It also ignores and conflicts with this Court's previous teaching that actual malice must be demonstrated to establish that a statement made during a labor dispute is defamatory and, therefore, unprotected speech.

Petitioners submit that the state courts are critically in need of direction and clarification from this Court on the issue of a labor organization representative's scope of employment for purposes of immunity from defamation liability in the context of a labor dispute. The Ohio courts' determination that the scope of employment of labor representatives is confined to those actions and statements expressly voted upon and approved by their membership threatens the fundamental structure and policies upon which federal labor law has been developed and refined by this Court.

### A. Petitioners Slick and Griffith, As Agents and Representatives of a Labor Organization, are Immune From Liability Under Both Federal and State Law.

Both the Ohio and Federal legislatures have mandated that the agents and representatives of a labor organization not be held responsible in their individual capacities for union wrongdoing. Section 301(b) of the Labor-Management Relations Act, 29 U.S.C. § 185, provides:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets and shall not be enforceable against any individual member or his assets.

29 U.S.C. § 185(b). Similarly, the corresponding Ohio statute provides as follows:

> All assets, property, funds, and any right or interest, at law or equity, of such unincorporated association

> shall be subject to judgment, execution or other process. A money judgment against such unincorporated association shall be enforced only against the association as an entity and shall not be enforceable against the property of an individual member of such association.

O.R.C. 1745.02.

As early as 1962, this Court has consistently upheld the legislative intent of Section 301 immunizing labor representatives from union liabilities:

> When Congress passed s. 301, it declared its view that only the union was to be made to respond for union wrongs, and that the union members were not to be subject to levy. Section 301(b) has three clauses. One makes unions suable in the courts of the United States. Another makes unions bound by the acts of their agents according to conventional principles of agency law (cf. s. 301(e)). At the same time, however, the remaining clause exempts agents and members from personal liability for judgments against the union (apparently even when the union is without assets to pay the judgment).

*Atkinson v. Sinclair Refining Company*, 370 U.S. 238, 247-48, 82 S. Ct. 1318, 1324, 8 L. Ed. 2d 462 (1962), *reversed on other grounds, Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970). *See also Complete Auto Transit, Inc. v. Reis,* 451 U.S. 401, 101 S. Ct. 1836, 68 L. Ed. 2d 248 (1981). *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470, 80 S. Ct. 489, 496, 4 L. Ed. 2d 442 (1960).

Section 301(b) evidences "a congressional intention that the union as an entity, like a corporation, should — be the sole source of recovery for injury inflicted by it". *Lewis, supra.* Similar to a corporation, the labor organization carries out its purpose through agents and representatives. Frequently, this Court has analogized the structure of a labor organization to

that of our federal government. *See Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198 (1944) ("the representative is clothed with power not unlike that of a legislature"); *Air Line Pilots v. O'Neill*, 499 U.S. 65 (1991); *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). Under both federal and state law, the representatives of employee labor organizations are elected by the membership to act as the membership's agent. Under both federal and state law, the statutory duty of the elected agents and representatives extends beyond the confines of the labor organization members' individual interests and includes the interests of all employees — union members or not — employed within the bargaining unit. In their capacity as "the sole voice" for the organization as a whole, labor organization representatives have actual and apparent authority to act on behalf, and in the best interests of, the membership.

The statutory scheme which creates and certifies employee labor organizations, both public and private, establishes the right and obligation of the labor organization – by and through its agents and representatives – to fairly represent the bargaining unit as a whole. Thus, this Supreme Court has "stressed that union discretion is essential to the proper functioning of the collective bargaining system." *Vaca v. Sipes*, 386 U.S. 171 (1967). And this Court further acknowledged that:

> The complete satisfaction of all who are represented is hardly to be expected. **A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents**, subject always to complete good faith, and honesty of purpose in the exercise of its discretion. (emphasis added).

*Ford Motor Co., supra*, at 338. *See also Air Line Pilots, supra*; *Walker v. P*I*E Nationwide, Inc.*, 588 F.2d 1323, 1326 (6th Cir. 1992). "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing

the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots, supra.*

The requirement imposed by the Appellate Court, that each and every act and statement undertaken by a union representative be expressly approved by the union membership, extinguishes any discretion on the part of labor representatives. Moreover, that requirement will surely chill the free speech rights of labor representatives, for they may be held individually liable for any given statement they make if their membership has not previously voted and approved the statement. It would be ludicrous to require a representative in Congress to seek express approval from his constituency for each and every statement made by the representative. It is equally ludicrous to impose such a rule on labor representatives.

The Ohio appellate courts' analysis flies in the face of this Court's holding in *Complete Auto Transit, supra.* In that case, this Supreme Court upheld the individual immunity afforded union members and representatives under Section 301. Relying on its analysis in *Atkinson, supra*, this Court held that the statutory immunity of individual union members and representatives extends not only to acts authorized by the union but their unauthorized acts as well:

> Although lengthy and complex, the legislative history of Section 301 clearly reveals Congress' intent to shield individual employees from liability for damages . . . **whether or not the union participated in or authorized the illegality**. Indeed, Congress intended this result even though it might leave the employer unable to recover for his losses. *See Atkinson v. Sinclair Refining Co., supra,* at 248, 82 S.Ct., at 1324. (emphasis added).

*Complete Auto Transit, supra*, at 407-408, 101 S. Ct. at 1841 (emphasis added).

"To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental

to the conduct authorized." Restatement of the Law 2d, Agency (1958), Section 229. In the instant action, the Association authorized the individual Petitioners, as their agents and representatives, to issue a statement before the Board of Education regarding the Association's support of the statutory process for nonrenewing Respondent's administrative contract. Petitioners Slick and Griffith wrote and delivered the statement. Given the representational nature of Petitioners employment, including their duty and discretion to act on behalf of the membership as a whole, reasonable minds simply could not reach any conclusion other than the statement was presented in the scope of the Petitioners' employment. Contrary to the appellate court's conclusion, the fact that the membership did not review, vote on, and specifically approve each and every sentence contained in the statement, did not remove the statement from the scope of Petitioners' employment. The entire statement presented by Petitioners was done on behalf of Association members, before their employer and in defense of Association members and their working conditions. The statement was "in furtherance of union activities", seeking to protect the interests of members as to wages, hours, and other terms and conditions of employment.

The Ohio courts' conclusion to the contrary is in conflict with federal labor policy as established and recognized by this Court. The Ohio courts' analysis evidences the critical need for clarification and resolution by this Court as to the scope of a labor representative's employment for purposes of defamation immunity under Section 301(b).

### B. In the Absence of Demonstrated Malice, Petitioners Slick and Griffith Could Not Be Held Liable for Alleged Defamatory Statements Made in the Context of a Labor Dispute.

Even, *assuming arguendo*, that Petitioners Slick and Griffith were not statutorily immune from liability in this matter, they still could not be held liable for their statement before the Board in the absence of demonstrated malice. The statement was made

in the context of a labor dispute and Respondent has failed to present any evidence of malice on the part of Petitioners. In light of this Court's previous decisions, Petitioners were not liable for Respondent's defamation claims.

This Supreme Court has repeatedly recognized the wide latitude which must be afforded discussions that occur in the context of labor disputes. *See Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966); *Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) ("freedom of speech . . . has long been a basic tenet of federal labor policy"). As the Court established in *Linn, supra*:

> [Federal Law] — manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered "against the background of a profound * * * commitment to the principle that debate * * * should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.

*Id.* at 62, 86 S. Ct. at 663. The recognized need to preserve open debate in the labor context has led this Court to hold that federal labor laws actually preempt application of state defamation laws to the extent the state seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or reckless disregard of truth (i.e., without malice). *Old Dominion, supra*, relying on *Linn, supra*. As the Court explained in *Linn:*

> In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.
>
> The standards enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act.

*Linn, supra,* at 64-65, 86 S. Ct. 664.

There is no question that a labor dispute existed at the time the Association's statement was delivered to the employer Board of Education. The controversy over Respondent's continued employment had wrought havoc throughout the schools in which the Association's membership worked. In addition, Respondent McIntosh, an agent of the employer, had blamed the Association's membership for weaknesses attributed to him by the Board. The statement delivered to the Board of Education was rendered in an attempt to preserve and defend the terms and conditions of employment of the Association's members. There existed an obvious dispute between the Petitioner Association (i.e., labor) and Respondent McIntosh (i.e., the employer) regarding student discipline and Respondent's disruption of the students. While the labor dispute at issue herein was not an organizing dispute as in *Linn,* it is nevertheless a

labor dispute for purposes of protected speech. As this Court fully recognized in *Old Dominion, supra*:

> whether *Linn's* partial preemption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute"; rather, application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

*Old Dominion, supra*, at 279, 94 S. Ct. at 2778. The Association's communication to the Board of its opinions and concerns regarding the statutory processes for the removal of Respondent, and the preservation of Association members' working conditions, was done in the context of a labor dispute and required the protection of the actual malice test. Association members had a clear employment interest in whether the Respondent would be retained as their high school principal (i.e., as their direct employment supervisor) and the impact that his actions, and the circumstances of his non-renewal, were having upon students, their schools and their community (i.e., working conditions).

In light of this record and the law established by this Court regarding defamation actions for statements made during a labor dispute, it is apparent that, even in the absence of statutory immunity, Respondent McIntosh could not maintain a defamation action against Petitioners Slick and Griffith in the absence of any evidence of malice. As the trial court found, the record is devoid of any evidence of malice. The Ohio appellate court's refusal to reach this same conclusion is plain and prejudicial error.

## CONCLUSION

For the reasons set forth above, Petitioners respectfully submit that this Court should address the issue of whether Respondent, a public school principal, was a public official or public figure for purposes of his state defamation claims. This review is necessitated by the Ohio Supreme Court's erroneous interpretation of the standards established by *NY Times, supra*, and *Rosenblatt, supra*; the widespread divergence and conflict between the state courts on this issue; and the State Court's rejection of this Court's decisions in *Butts* and *Gertz*. Petitioners further submit that the Ohio courts' decisions in this matter necessitate this Court's review and resolution of the issue of a labor representative's scope of employment, entitlement to immunity, and freedom of speech in the context of a labor dispute. Petitioners respectfully urge this Court to accept jurisdiction over this appeal and grant the requested Petition.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE SUPREME COURT OF OHIO DATED AND DECIDED MAY 19, 1999

EAST CANTON EDUCATION ASSOCIATION ET AL., APPELLANTS, *v.* MCINTOSH, APPELLEE; OSNABURG LOCAL SCHOOL DISTRICT BOARD OF EDUCATION ET AL., APPELLANTS.

THE STATE EX REL. MCINTOSH, APPELLEE, *v.* OSNABURG LOCAL SCHOOL DISTRICT BOARD OF EDUCATION ET AL., APPELLANTS.

* * *

(Nos. 97-2039 and 98-834 — Submitted Janunary 12, 1999 — Decided May 19, 1999.)

APPEAL from the Court of Appeals for Stark County, No. 96-CA-0293.

APPEAL from the Court of Appeals for Stark County, Nos. 97-CA-50, 97-CA-56 and 97-CA-60.

These appeals arise from complex, convoluted, and questionable procedures. Nevertheless, the precise procedural details of each case are largely irrelevant. We accepted jurisdiction and consolidated the cases to consider (1) whether appellee John R. McIntosh had attained continuing service status as a teacher with the Marlington Local School Board of Education ("Marlington"), and (2) whether the Fifth Appellate District correctly concluded in its decisions that McIntosh was neither a public official nor a public figure for purposes of his defamation claims.[1] The

1. The appellants in these consolidated cases have set forth additional issues for our consideration. However, our holdings today are specifically confined to the issues considered, and we make no comment regarding the merits of any other issues addressed by the courts below or raised by the parties on appeal in this court.

supporting facts and procedural postures of the cases relevant to a proper determination of these issues are as follows.

Beginning in 1966, McIntosh was hired by Marlington as a seventh grade social studies teacher under a limited contract of employment. From the 1971-1972 through the 1975-1976 school years, McIntosh was assigned guidance counselor duties, and he also performed some teaching functions in the district. On April 8, 1975, Marlington voted to grant McIntosh a continuing contract of employment. McIntosh does not recall if a written contract was ever entered into. In June 1975, McIntosh accepted an administrative position as an assistant principal with Marlington. From the 1975-1976 through the 1980-1981 school years, McIntosh was employed by Marlington as an assistant principal, and, from the 1981-1982 through the 1986-1987 school years, he served as a principal in the district.

Following his employment with Marlington, McIntosh was hired by appellant Osnaburg Local School Board of Education ("Osnaburg" or "board"). From the 1987-1988 through the 1989-1990 school years, McIntosh was employed by Osnaburg as the East Canton High School assistant principal, and, from the 1990-1991 through the 1994-1995 school years, he served as the high school principal.

In February 1995, McIntosh met with Osnaburg to discuss his employment status for the coming school year. The board informed him that it intended not to renew his administrative contract, which was set to expire on July 31, 1995. The board proposed to McIntosh that he resign his

position as principal and that he could become an employee of the Stark County Department of Education. McIntosh refused to resign. He advised the board that he was a tenured teacher and that he was entitled to reemployment within the district.

In March 1995, Osnaburg notified McIntosh of its intention not to reemploy him. Students became aware of the board's intentions, and some began wearing "Keep Mac" ribbons. The media also became involved. On March 9, 1995, appellant Dr. George McGuire, the school superintendent, in the presence of two police officers, ordered McIntosh to vacate the school building, and he was placed on home assignment. McGuire warned McIntosh that if he returned to the school, he would be considered a trespasser and that appropriate action would be taken against him. Numerous students showed further support for McIntosh by not reporting to school, by leaving school during school hours, and by making signs. Some students held demonstrations outside the school building.

In a letter dated March 10, 1995, McGuire informed McIntosh that he (McGuire) was going to recommend to the board that McIntosh's "teaching/administrative contract(s) with the District be suspended and/or terminated" for, among other things, "gross inefficiency," "immorality," "willful and persistent violations of reasonable regulations of the Board of Education," "ineffectiveness in maintaining appropriate student discipline," "student safety," and "condoning and/or promoting student unrest." McIntosh was also advised that he could appear before the board on March 13, 1995 "to show cause why your contract(s) should not be suspended and/or terminated."

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Additionally, on March 10, 1995, appellant Sharon E. Griffith met with members of appellant East Canton Education Association ("ECEA"). Griffith was president of ECEA. According to Griffith, ECEA members voted at the March 10 meeting "to issue a public statement addressing McIntosh's actions." The "public statement" was written by appellant Mary Jo Slick, a labor relations consultant for appellant Ohio Education Association ("OEA"), and it was read by Griffith at the March 13, 1995 board meeting.[2]

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2. The statement written by Slick and read by Griffith at the March 13, 1995 board meeting provides:

"My name is Sharon Griffith and I am President of the East Canton Educators' [*sic*] Association. I am here tonight specifically authorized by our membership to address you on their behalf and to express their views on the recent events in our district. In fact, the vote of our teachers was overwhelming — only 4 no votes from the entire staff.

"It is with great sadness that the staff here tonight felt it necessary to take the unusual step of publicly entering this debate. *Let there be no doubt, the ECEA supports the recommendation of the Superintendent and urges this Board to do the same.*

"This issue never was, and should not have become, one that was personalized around one individual. Mr. McIntosh IS NOT the issue here tonight. Rather, the issue is whether or not representative democracy is alive and well in this district or shall we be governed hereafter by mob rule.

"The people here tonight DO NOT represent the East Canton community. They can only represent themselves. While they are

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certainly entitled to their opinions, they are elected by no one and accountable to no one. On the other hand, this Board was elected by the entire community and is accountable at the ballot box. That is the democratic process that has made this country great and protected the silent majority from small vocal self-interest groups such as those here tonight.

"The proper function of any school board is to develop a philosophy of education that will guide the district and then to hire the very best Superintendent to lead the school team. As in any team undertaking, there can only be one leader — one quarterback. Otherwise, what you have is chaos. This Board has selected its leader — Dr. McGuire.

"Who in this room tonight is trained, experienced and authorized by law to evaluate John McIntosh? Only Dr. McGuire. Who in this room tonight knows ALL the facts and circumstances surrounding the performance of this principal, not just what he has chosen to share? Dr. McGuire and the Board. On what basis could the group of people here tonight possibly substitute their judgment for that of the Superintendent and the Board? If the Board surrenders to making personnel decisions to those who show up and yell the loudest, they and this community can plan on this type of disruptive spectacle at every Board meeting. And worst of all, what type of lessons are we teaching our children about respect for authority and process?

"As I said a minute ago, this issue should never have been personalized. However, Mr. McIntosh has chosen to do so. When discussing the Board's charge that he had problems with disciplining students, he was quoted in the newspaper as blaming 'weak teachers.' I have personally reviewed every evaluation of each high school teacher. There is not one criticism of any of the teachers, by Mr. McIntosh or any other evaluator, regarding student discipline.

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At the March 13 meeting, the board voted to suspend McIntosh and not to reemploy him at the expiration of his

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(Cont'd)

"For Mr. McIntosh to attempt to blame our high school staff for his alleged inadequacies is unconscionable. The major job of a principal should be to properly and fairly evaluate teachers. If the staff in this district was 'weak in discipline', it was Mr. McIntosh's job to evaluate, record and deal with the problem. He either failed to do so, or was less than honest when he made his statement to the press. *How could this Board or community ever expect our staff to work for Mr. McIntosh as their supervisor or even with him as a fellow teacher after such a self-serving attack?*

"There are laws in this State that provide Mr. McIntosh or any school employee with certain due process rights. The Association supports such a procedure. If, in fact, he has truly been treated unfairly or illegally, why then did Mr. McIntosh not use the proper process? It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district.

"Tonight it is this Board of Education that will be the teacher. By your actions and decisions what shall you teach us? Shall this community, staff and students learn from you that protest signs, name-calling, manipulation of the media and students, and angry crowds shall define the decision-making process for the Osnaburg Local School District.

"Rather, the professional staff of the East Canton School District hopes that the lesson we learn from you tonight is that in a civilized society, the silent majority, representative democracy, accountability, and the proper process are important. We owe our children no less. Please support the process — please allow this Superintendent to do the job for which you hired him." (Emphasis *sic.*)

administrative contract. Thereafter, the board held another meeting and, ultimately, did not renew McIntosh's administrative contract. The board concluded that he did not have a right to employment as a teacher in the school district. Events surrounding McIntosh's nonrenewal received considerable media attention.

On March 17, 1995, McIntosh filed a complaint in the Stark County Court of Common Pleas (case No. 1995-CV-475), naming, as defendants, Osnaburg, the individual members of the board, and McGuire. McIntosh sought a declaratory judgment, a writ of mandamus, an injunction, and monetary damages. McIntosh alleged that he was a tenured teacher, that he should be afforded all rights and privileges pertaining to that status, and that he was entitled to continuing service status as a teacher with Osnaburg. McIntosh also advanced, among other claims, allegations of defamation. Specifically, McIntosh alleged that the charge of immorality and other statements made by McGuire and ratified by the board and its members were false and actionable.

On December 22, 1995, ECEA filed a declaratory judgment action in the trial court (case No. 1995-CV-2208-1), seeking a determination that McIntosh had not attained continuing service status with Marlington. ECEA also requested, in the alternative, that if the court should find that McIntosh had attained tenure status with Marlington, then he should not be allowed to displace or cause the layoff of any member of ECEA in the Osnaburg school district. By amended complaint, the board was also made a party defendant in the case.

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On February 9, 1996, McIntosh responded to ECEA's declaratory judgment action. He filed an answer and a counterclaim against ECEA and a third-party complaint against Slick, Griffith, and OEA. McIntosh's third-party complaint against Slick and Griffith was brought against them in both their individual and representative capacities. In his counterclaim and third-party complaint, McIntosh advanced various causes of action, including claims for defamation. His defamation claims were predicated on passages contained in the statement prepared by Slick and read by Giffith at the March 13, 1995 board meeting.

On August 22, 1996, Judge James S. Gwin, the trial judge assigned to case No. 1995-CV-2208-1, granted summary judgment in favor of ECEA, Slick, Griffith, and OEA, regarding all actions brought by McIntosh in his counterclaim and third-party complaint. With respect to McIntosh's defamation claims, Judge Gwin held that Slick and Griffith were not personally liable to McIntosh for any actions taken by them on behalf of the associations they represented, that McIntosh was a public figure, and that the statement prepared by Slick and read by Griffith at the March 13, 1995 board meeting did not contain defamatory language.

On appeal, a panel of judges from the Ninth Appellate District sitting by assignment in the Fifth District Court of Appeals (case No. 96-CA-293) reversed the judgment of the trial court in part and affirmed it in part, and remanded the cause for further proceedings. The court held, *inter alia,* that McIntosh was neither a public official nor a public figure and that genuine issues of material fact existed as to whether certain passages contained in the statement read by Griffith at the March 13, 1995 board meeting were defamatory.

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ECEA's declaratory judgment action, case No. 1995-CV-2208-1, had been consolidated with McIntosh's complaint, case No. 1995-CV-475. (ECEA became a party in case No. 1995-CV-475 upon the consolidation of the cases.) Subsequently, on January 23, 1997, Judge John F. Boggins, the trial judge assigned to case No. 1995-CV-475, decided all the claims remaining in both cases and issued two judgment entries. In one entry, Judge Boggins concluded that McIntosh had attained continuing service status as a teacher with Marlington and that he was entitled to employment as a teacher in the Osnaburg school district. With respect to McIntosh's other claims, including the claims for defamation, Judge Boggins, in the other entry, granted summary judgment in favor of the board, its members, and McGuire.

On appeal, a panel of judges from the Seventh Appellate District sitting by assignment in the Fifth District Court of Appeals (case Nos. 97-CA-50, 97-CA-56 and 97-CA-60) affirmed the judgment of the trial court in part, modified it in part, reversed it in part, and remanded the cause for further proceedings. The court held that McIntosh had attained continuing service status with Marlington, that his tenure rights transferred from Marlington to Osnaburg, and that McIntosh was entitled to employment as a teacher in the Osnaburg school district. The court also determined, among other things, that the trial court erred in dismissing McIntosh's defamation claims against the board, its members, and McGuire.

Each cause is now before this court upon the allowance of a discretionary appeal.

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*Appendix A*

**DOUGLAS, J.**

I

ECEA, McIntosh, and the board filed stipulations with the trial court in case No. 1995-CV-2208-1. In paragraph five they agreed that "[a]t its regular meeting of April 8, 1975, the Marlington Local School District Board of Education voted to grant Defendant McIntosh a continuing contract of employment." In paragraph six they stated further that "[a]lthough the Marlington Local School District Board of Education took such action at its April 8, 1975 meeting, Defendant McIntosh has no recollection that a continuing contract of employment was ever physically issued to, or executed by him."

ECEA correctly states that if McIntosh had attained continuing contract status as a teacher with Marlington in 1975, then he would be "entitled to a continuing contract [as a teacher] upon the non-renewal of his subsequent administrative employment" with Osnaburg. This conclusion is supported by R.C. 3319.11(B), which provides that "[t]eachers eligible for continuing service status in any * * * school district shall be those teachers qualified as described in division (B)(1) or (2) of section 3319.08 of the Revised Code, who within the last five years have taught for at least three years in the district, and those teachers who *having attained continuing contract status elsewhere,* have served two years in the district * * *." (Emphasis added.) Moreover, in *State ex rel. Kelley v. Clearcreek Local School Dist. Bd. of Edn.* (1990), 52 Ohio St.3d 93, 556 N.E.2d 173, this court held that "[a] certified teacher who has attained continuing

service status in one school district, and who has served at least two years as an administrator in a second school district, is entitled to a continuing service contract as a teacher in the second school district if the administrative contract is not renewed." *Id.* at syllabus.

ECEA contends, however, that Osnaburg was justified in not reemploying McIntosh as a teacher in the district because McIntosh failed to establish that he actually attained continuing service status with Marlington. ECEA points out that the record does not contain a written continuing contract of employment between McIntosh and Marlington. Therefore, according to ECEA, in order to establish that he is entitled to continuing service status as a teacher with Osnaburg, McIntosh was required to comply with R.C. 3319.08, which he failed to do.

R.C. 3319.08 states that "[t]he board of education of each * * * school district * * * *shall enter into written contracts for the employment and reemployment of all teachers.*" (Emphasis added.) However, entitlement to continuing service status as a teacher is not dependent upon a written contract of employment between the teacher and the board. R.C. 3319.08 also provides that "[i]f the board adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, *the failure of such parties to execute a written contract shall not void such employment contract.*" (Emphasis added.) See, also, *State ex rel. Smith v. Etheridge* (1992), 65 Ohio St.3d 501, 505, 605 N.E.2d 59, 62 ("Ordinarily, R.C. 3319.08 will validate a contract where the board does not put such contract in writing but the

employee performs his or her duties as though a written contract were present.").

Specifically, ECEA points to the language "the teacher accepts such employment" in R.C. 3319.08, and asserts that, in the absence of a written contract between the teacher and the board, the teacher claiming continuing service status must present affirmative evidence that he or she had in fact accepted a continuing contract offer of employment. In this regard, ECEA claims that McIntosh "has not, and cannot, establish such acceptance." ECEA states that "[t]here is no evidence in the record that [McIntosh] ever responded to the continuing contract offer; and, he did not commence performance pursuant to that offer of a continuing contract. Rather, [McIntosh] expressly accepted the [Marlington] Board's subsequent offer of a limited (one-year) administrative contract of re-employment for the 1975-1976 school year and executed a written contract evidencing that acceptance. Plainly, the parties' express and written agreement that [McIntosh] would be employed pursuant to a limited administrative contract for the 1975-1976 school year precludes a contemporaneous finding that [McIntosh] was employed during that year under a continuing teaching contract."

We disagree. ECEA misinterprets the statute. In order to accept ECEA's interpretation of R.C. 3319.08, we would have to add language to the statute that simply does not exist. By its very terms, R.C. 3319.08 does not contain language that places an affirmative duty on the teacher to establish that he or she had in fact accepted a continuing contract of employment. Rather, R.C. 3319.08, when read in conjunction

with R.C. 3319.11(B)(1), supports a finding that the attainment of continuing service status by an eligible teacher is not dependent upon a written contract of employment between the teacher and a board of education. If, after a teacher attains continuing service status, the board adopts a motion or resolution to employ the teacher under a continuing contract of employment, the teacher will be considered to be employed and serving under a continuing contract of employment. In fact, the only qualifying condition precedent found in R.C. 3319.11(B)(1) is if the board, by a three-fourths vote, refuses to reemploy the teacher. Here, the board voted to grant McIntosh a continuing contract. In such a case, the teacher will have attained continuing contract status. Thus, we agree with the conclusions reached by the trial court and the panel of judges from the Seventh Appellate District sitting by assignment in the Fifth Appellate District that McIntosh had attained continuing service status as a teacher with Marlington in 1975.

We also reject ECEA's assertion that McIntosh's acceptance of the administrative contract, subsequent to Marlington's vote to offer him a continuing contract of employment, served as a rejection of that offer, thereby waiving his continuing contract status. R.C. 3319.02(C)[3] expressly allows a teacher to accept an administrative position without jeopardizing his or her continuing service status as a teacher. See, also, *Kelley, supra*. Therefore,

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3. R.C. 3319.02(C) states, "When a teacher with continuing service status becomes an assistant superintendent, principal, assistant principal, or other administrator with the district or service center with which the teacher holds continuing service status, the teacher retains such status in the teacher's nonadministrative position as provided in sections 3319.08 and 3319.09 of the Revised Code."

McIntosh did not waive his continuing teaching status upon subsequently accepting the administrative position with Marlington.

II

In case No. 96-CA-293, a panel of judges from the Ninth Appellate District sitting for the Fifth District Court of Appeals thoroughly reviewed relevant decisions from this court and the United States Supreme Court and concluded that McIntosh was neither a public official nor a public figure for purposes of his defamation claims. This ruling regarding McIntosh's status was, also, subsequently adopted by the panel of judges from the Seventh Appellate District sitting for the Fifth Appellate District in case Nos. 97-CA-50, 97-CA-56 and 97-CA-60, "[s]o as to assure a consistent application of law within the context of the separate defamation claims."

In *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, the United States Supreme Court held that the constitutional protections afforded by the First and Fourteenth Amendments prohibit a public official from recovering damages for alleged defamatory statements relating to his or her conduct unless the official can establish that the statement was made with actual malice. The court declined, however, to determine "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of [the actual malice] rule, or otherwise to specify categories of persons who would or would not be included." *Id.*, 376 U.S. at 283, 84 S.Ct. at 727, 11 L.Ed.2d at 708, fn. 23. However, guidance was provided later in *Rosenblatt v. Baer* (1966), 383 U.S.

75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597, 605, where the court determined that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." The court in *Rosenblatt* also observed that the *New York Times* rule is specifically applicable "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt,* 383 U.S. at 86, 86 S.Ct. at 676, 15 L.Ed.2d at 606. And "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 87, 86 S.Ct. at 676, 15 L.Ed.2d at 606, fn. 13.

This court has not considered the issue whether a public high school principal is a public official for purposes of defamation law. We have, however, in accordance with the *Rosenblatt* guidelines, considered the status of a high school superintendent and a high school teacher/wrestling coach. In *Scott v. The News-Herald* (1986), 25 Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699, paragraph two of the syllabus, we held that a public school superintendent is a public official. In *Milkovich v. The News-Herald* (1984), 15 Ohio St.3d 292, 15 OBR 424, 473 N.E.2d 1191, reversed in part on other grounds by *Scott, supra,* we determined that an individual is not a public official for purposes of applying the *New York Times* rule in a defamation action by virtue of

his employment as a public high school teacher and head wrestling coach.

Courts in other jurisdictions are divided whether public school principals should be accorded public official status. Annotation, Who is "Public Official" for Purposes of Defamation Action (1996), 44 A.L.R.5d 193, 318-323, Section 30. However, we believe that the better view is that principals are not public officials for purposes of defamation law. See, *e.g.*, *McCutcheon v. Moran* (1981), 99 Ill.App.3d 421, 424, 54 Ill.Dec. 913, 425 N.E.2d 1130, 1133 ("The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualified privileged assault upon his or her reputation."); and *Ellerbee v. Mills* (1992), 262 Ga. 516, 517, 422 S.E.2d 539, 540 ("[U]nder normal circumstances, a principal simply does not have the relationship with government to warrant 'public official' status under *New York Times*. Principals, in general, are removed from the general conduct of government, and are not policymakers at the level intended by the *New York Times* designation of public official.").

Accordingly, we hold that a public school principal is not a public official for purposes of defamation law. We affirm the findings of the Fifth Appellate District in this regard.

We also agree with the Fifth Appellate District that, under the circumstances here, McIntosh is not a "public figure" as defined by *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808. Specifically, the Fifth District Court of Appeals, in case No. 96-CA-293, aptly observed and held:

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"As a high school principal, McIntosh did not assume a role of special prominence in the affairs of society. He did not occupy a position of such persuasive power and influence that he can be deemed a public figure for all purposes as required by *Gertz*. Nor did he thrust himself to the forefront of the public controversy that may have developed concerning his termination. According to the record before us, McIntosh left the high school on March 9, 1995, when ordered to do so by the Superintendent and armed police officers. There is no evidence linking McIntosh to the actions of the students and parents who protested his termination. Nor is there any evidence that McIntosh sought out the media to trumpet his cause. Accordingly, the trial court erred in finding that McIntosh was a public figure and requiring that he be held to the *New York Times* standard of proving actual malice."

For the foregoing reasons, we affirm the judgments of the Fifth Appellate District with respect to case Nos. 97-2039 and 98-834. The causes are remanded to the Stark County Court of Common Pleas for further proceedings not inconsistent with this opinion.

*Judgments affirmed*
*and causes remanded.*

RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

COOK, J., concurs in part and dissents in part.

MOYER, C.J., dissents.

LUNDBERG STRATTON, J., dissents.

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**Cook, J., concurring in part and dissenting in part.** I agree with the majority that McIntosh's status as high school principal did not make him a public official for defamation purposes. I do not believe, however, that either R.C. 3319.08 or 3319.11(B)(1) supports the majority's conclusion that a teacher eligible for continuing contract status can be presumed to have attained that status just by virtue of having been offered it by a school board. Instead, the statutes require that the teacher without a written contract offer proof of continuing contract status plus acceptance through continued employment with the district.

R.C. 3319.08 pertains to all teaching contracts. It states the general rule that boards of education "*shall* enter into *written* contracts for the employment and reemployment of *all* teachers." (Emphasis added.) It provides only one exception to this rule: "If a board adopts a motion or resolution to employ a teacher under a limited or continuing contract *and the teacher accepts* such employment, the failure of such parties to execute a written contract shall not void such employment contract." (Emphasis added.) Any party seeking to enforce an unwritten contract under this exception, then, must demonstrate that (1) the board adopted the resolution, and (2) the teacher accepted it. Failure to demonstrate these elements will render the unwritten contract void.

The majority concludes that R.C. 3319.08 places no affirmative duty on McIntosh to establish acceptance of the contract. It states that such a requirement would "add language to the statute that simply does not exist." But in *State ex rel. Smith v. Etheridge* (1992), 65 Ohio St.3d 501,

505, 605 N.E.2d 59, 62, this court recognized that R.C. 3319.08 will validate an unwritten contract where the employee can show acceptance by "perform[ing] his or her duties as though a written contract were present." Thus, this court has previously acknowledged that evidence of acceptance is required. To read the statute otherwise is to disregard the statutory phrase "*and the teacher accepts such employment.*"

The majority also relies on R.C. 3319.11(B)(1) in concluding that a continuing contract presumptively exists here. This statute provides that "[u]pon the recommendation of the superintendent that a teacher eligible for continuing service status be reemployed, a continuing contract shall be entered into between the board and the teacher unless the board * * * rejects the recommendation * * *." The majority reads this to say that a contract automatically exists if the board does not reject the recommendation. But to interpret the statute this way presumes that teachers do not decline offers and move on to other employment. Instead, R.C. 3319.11(B)(1) must be read as providing for a second step after a recommendation, *i.e.*, that a contract *shall be entered into* — a step whereby the board and the teacher become parties to a written contract, as required by R.C. 3319.08. Moreover, R.C. 3319.11(B)(1) details exceptions where existence of an unwritten contract will be presumed, and none of those exceptions applies here.

Reading R.C. 3319.08 and 3319.11(B)(1) together, these statutes require a written contract between the board and the teacher unless one of the few specific exceptions applies. There was no written contract between McIntosh and the

Marlington board, and none of the R.C. 3319.11(B)(1) exceptions applies. Therefore, the only statutorily permissible means of establishing this contract is by demonstrating board approval and acceptance by the teacher, pursuant to R.C. 3319.08. It is undisputed that Marlington approved McIntosh for a continuing contract. McIntosh, as the party seeking to enforce the unwritten contract, must then present some evidence of his acceptance of it in accordance with R.C. 3319.08. The evidence shows that McIntosh accepted and began performing an *administrative* contract with the Marlington district immediately after the Marlington board approved his continuing *teaching* contract. Thus, McIntosh has not demonstrated acceptance of the teaching contract and, therefore, has not established his tenured teacher status through his Marlington employment.

Accordingly, I respectfully dissent from the majority opinion and judgment on this issue.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing opinion except to the extent that it concludes that John McIntosh was not a public official for purposes of defamation law.

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**Moyer, C.J., dissenting.** The majority has, in my view, made two erroneous findings: it has found John McIntosh to be entitled to continuing contract status as a teacher and it has found him to be a private figure for purposes of constitutional defamation law.

It should also be observed that the majority has failed to address significant issues presented in these appeals, thereby depriving the courts, on remand, of guidance needed to reach a final resolution of this case. Those issues include (1) whether, assuming McIntosh should be deemed a tenured teacher, he should also be deemed a member of the bargaining unit governed by the collective bargaining agreement existing between the Osnaburg Local Board of Education and the East Canton Education Association; (2) whether McIntosh failed to establish, prima facie, the elements of the torts upon which he bases his claims; (3) whether the appellants established the elements of common-law immunity defenses warranting entry of summary judgments in their favor; and (4) whether appellants' speech is protected by Section 11, Article I of the Ohio Constitution, independently of the protection provided by the First Amendment to the Constitution of the United States.

I write separately to express my view on the first of the omitted issues and to express my opinion regarding the issues decided by the majority.

I

Continuing Contract Status

I do not disagree with the law stated by the majority in the first paragraph of the syllabus. However, adoption of the

syllabus does not mandate the conclusion that John McIntosh should be deemed entitled to tenure as a teacher in the Osnaburg Local School District. McIntosh simply never obtained continuing contract status as a teacher in the Marlington Local School District. Therefore, continuing contract status could not remain with him when be became employed in the Osnaburg school district.

Where parties have jointly stipulated to facts, the sole function of the court is to apply the law to the facts placed before it. *Cunningham v. J.A. Myers Co.* (1964), 176 Ohio St. 410, 27 O.O.2d 379, 200 N.E.2d 305. In the case at bar, the parties have stipulated that McIntosh taught under limited (not continuing) teaching contracts through the 1971-1972 school year and that he thereafter served primarily as a guidance counselor under additional limited teaching contracts. Thus, it follows from the express stipulations of the parties that, when the Marlington school board authorized issuance of a continuing contract for the 1975-1976 school year to McIntosh, that authorization was for McIntosh's first continuing teacher's contract, with duties to begin in the fall of 1975 and continuing through the spring of 1976.

In June 1975, however, the Marlington school board offered McIntosh a one-year administrative contract to serve as an assistant principal in the Marlington system for the 1975-1976 school year. McIntosh chose to accept the school board's offer of an administrative contract and served as an assistant principal, rather than a teacher, during the 1975-1976 school year. By choosing to serve as an administrator, McIntosh abandoned any rights he may otherwise have had to insist on the execution of a written continuing teacher's

contract for the 1975-1976 school year, or the right to teach that year. One cannot accept employment to simultaneously be both a full-time teacher and a full-time administrator.

The school board's action in June offering to hire McIntosh as an administrator thus did not occur "after [McIntosh] attain[ed] continuing service status." The first paragraph of the syllabus does not apply to the facts of this case because McIntosh never accepted the offer of a continuing teacher's contract and never obtained that status. The syllabus describes consequences that follow *after* a teacher has attained continuing service status by both having been offered, *and having accepted,* a continuing contract.

R.C. 3319.11 indeed creates presumptions that a teacher has accepted employment actually offered, or statutorily required to be offered, by a board of education "unless [the teacher] notifies the board in writing to the contrary on or before the first day of June" preceding the school year to be covered in the contract. R.C. 3319.11(B)(1), (C)(2), (C)(3), (D), and (E). I would hold that any such statutory presumption of acceptance is overcome where, as here, an employee offered both a contract to teach and a contract to serve as an administrator for the same school year chooses to accept the administrator position before having undertaken any teaching activities pursuant to the offered teaching contract. Even though it might otherwise be presumed that acceptance of the school board's offer to employ McIntosh as a teacher for the 1975-1976 school year occurred on June 1, 1975, that presumption is clearly rebutted by the stipulations of the parties as to McIntosh's subsequent actions in failing to undertake tenured teaching responsibilities

pursuant to the offered teaching contract in favor of undertaking untenured administrative duties.

II

Bargaining Unit Membership

In failing to address the parties' conflicting arguments as to whether McIntosh is subject to the collective bargaining unit governing teachers at East Canton High School, the majority has presumably left undisturbed the decisions of the appellate courts that he is not a part of the East Canton Education Association bargaining unit. Assuming, as does the majority, that McIntosh is entitled to be recognized as a tenured teacher, I cannot accept the premise that he is not included within that bargaining unit, which is defined as "all certificated personnel employed by the District [excluding] * * * casual substitutes who work less than (60) days in the same position, and those management, confidential and supervisory employees excluded under 4117 ORC."

If McIntosh is deemed to be a tenured teacher, he falls within this definition. His right, if any, to legally opt out of membership in the union does not affect his inclusion in the bargaining unit. The conclusions of the appellate court to the contrary are clear error and should be recognized by the majority as such.

III

Constitutional Issues

Since *New York Times v. Sullivan,* the law has recognized "a federal rule that prohibits a public official from recovering

damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706. Since 1974, the *New York Times* "actual malice" requirement has applied to plaintiffs found to be public figures as well as public officials. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789.

The majority concludes that John McIntosh was neither a public official nor a public figure as to the controversy surrounding the appellant school board's efforts to terminate him from his position as principal of East Canton High School, a school of approximately three hundred twenty students in a comparatively small community. The legal consequence of such a conclusion is that McIntosh may recover damages if, on remand, he is able to prove that false and defamatory statements concerning him were made by the defendant school administrators and union representatives and that the making of those false statements resulted from mere negligence rather than actual malice, *i.e.*, knowledge that the statements were false or with reckless disregard as to whether they were false or not. *New York Times v. Sullivan, supra.*

A review of the record and the law causes me to conclude, as did both trial courts in this consolidated case, that John McIntosh was both a public official and a public figure for purposes of his defamation claims and that his failure to proffer proof that appellants acted with actual

malice entitles the appellants to summary judgments in their favor as to those claims.

A

Private Figure/Public Official Status

I do not concur in paragraph two of the syllabus. In adopting the sweeping rule that "[a] public school principal is not a public official for purposes of defamation law," the majority has diminished the likelihood of open, free, and vigorous public debate concerning the operation of public schools and has contradicted this court's prior recognition that " 'debate on public issues should be uninhibited, robust, and wide-open.' " *Seven Hills v. Aryan Nations* (1996), 76 Ohio St.3d 304, 306, 667 N.E.2d 942, 946, quoting *New York Times Co. v. Sullivan,* 376 U.S. at 270, 84 S.Ct. at 721, 11 L.Ed.2d at 701. I am not unmindful of the reality that school administrators as well as school board members are, at times, subjected to harsh and unfair criticism. However, I believe that vigorous debate is indispensable to achieving the goal of improvement of the public schools and ultimately to the vitality of our democratic system.

Public officials include "at the very least * * * those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer* (1966), 383 U.S. 75, 85, 86 S.Ct. 669, 676, 15 L.Ed.2d 597, 605. In determining whether any particular government employee is a public official for purposes of a *New York Times* analysis, the test is whether that employee holds a "position in government [that] has

such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt* at 86, 86 S.Ct. at 676, 15 L.Ed.2d at 606. Following a comprehensive review of cases, Professor Smolla has concluded that "there are relatively few examples of government-related defamation plaintiffs who are held *not* to be public officials subject to the *New York Times* standard * * * usually [those who] have a peripheral or transient connection to governmental activity, or are extremely low in the organizational hierarchy." (Emphasis *sic.*) Smolla, Law of Defamation (1998) 2-89 to 2-90, at Section 2.25[1].

The naming of a public school principal, particularly a high school principal, is an event widely published and discussed in many communities, as is the conduct of such individuals once they undertake the duties of their position. This is particularly true in small communities the size of East Canton, where only one high school serves the entire community. Principals in such communities are perceived to have significant influence over the schools they administer and are frequently deemed by the members of the community to be largely responsible for the educational quality of those schools. In light of the generally held perception that high school principals exercise both responsibility and control over their schools, and because the provision of public education is a governmental function, I believe that many, if not all, public school principals will be found to meet the *Rosenblatt* test. I further believe that the facts demonstrated by the record before us clearly justify the conclusion that McIntosh should be deemed a public official for purposes of resolving the defamation claims made by him, which

clearly were related to McIntosh's continuation in his public position.

In *Scott v. The News-Herald* (1986), 25 Ohio St.3d 243, 25 OBR 302, 496 N.E.2d 699, this court held, as syllabus law, that a school superintendent is a public official for purposes of defamation law. I cannot, nor does the majority attempt to, distinguish a school superintendent from a high school principal for purposes of determining public official status. Both are school administrators. Both are responsible for implementing the policies adopted by a local school board. Both are expected to serve as public role models for students. Both exercise supervisory authority over those who have more direct contact with the children of the community. Many of these individuals assume active roles in the life of their greater communities. As did the superintendent in *Scott,* high school principal McIntosh held a position in the community of East Canton in which "[p]ublic scrutiny of [his] official conduct, as well as those aspects of his private life which relate to his suitability for his position, was an inconvenience which he no doubt endured." *Scott,* 25 Ohio St.3d at 256-257, 25 OBR at 313, 496 N.E.2d at 711 (Douglas, J., concurring). Both school superintendents and principals hold positions which invite public scrutiny and discussion concerning them, based solely on the basis of the positions they hold. Cf. *Rosenblatt,* 383 U.S. at 86-87, 86 S.Ct. at 676, 15 L.Ed.2d at 606, fn. 13.

In observing that we have previously rejected the contention that a high school wrestling coach was a public official, the majority fails to acknowledge that the *Milkovich* classification of a high school wrestling coach as a private figure was subsequently effectively overruled in *Scott.* (" 'To

say that Milkovich [the wrestling coach] nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.' * * * Accordingly, *we overrule Milkovich in its restrictive view of public officials* and hold a public school superintendent is a public official for purposes of defamation law." [Emphasis added.]) *Scott,* 25 Ohio St.3d at 247-248, 25 OBR at 306, 496 N.E.2d at 704, quoting Justice Brennan, dissenting, *Lorain Journal Co. v. Milkovich* [1985], 474 U.S. 953, 964, 106 S.Ct. 322, 330, 88 L.Ed.2d 305, 313-314.

The majority cites as "the better view" two cases in which courts in other jurisdictions have refused to find public school principals to be public officials for purposes of defamation law. I cannot agree, nor have the courts that ruled to the contrary in the following cases agreed: *Johnson v. Robbinsdale Indep. School Dist. No. 281* (D.Minn.1993), 827 F.Supp. 1439; *Kapiloff v. Dunn* (1975), 27 Md.App. 514, 343 A.2d 251; *Palmer v. Bennington School Dist.* (1992), 159 Vt. 31, 615 A.2d 498 (elementary school principal); *State v. Defley* (La.1981), 395 So.2d 759, 761.

The facts of a specific case might warrant a finding that a particular public school principal is not required to meet the *New York Times* actual-malice standard in a defamation action even though he or she is deemed to be a public official. This might occur where, for example, the claimed defamatory statement concerning the principal related to purely personal conduct unrelated to either the principal's performance in, or fitness for, his or her position. See *New York Times v. Sullivan,* 376 U.S. at 283, 84 S.Ct. at 727-728, 11 L.Ed.2d at 708, fn. 23; Smolla, *supra,* at 2-100, Section 2.27[2]. Such a result would properly be grounded, however, not on a

conclusion that the principal was not a public official, but rather on a failure of the defendant to demonstrate the second prong of the *New York Times* test, *i.e.*, that the alleged defamatory statement "related to" the official conduct of the public official.

I would not hold to a general rule that all public school principals necessarily should be deemed public officials, although I believe that in most cases they will qualify as such. I believe instead that, ultimately, the determination of public official status should be determined on the basis of the particular facts surrounding the alleged defamation. For the same reason, this court should not adopt a broad general rule of syllabus law precluding a finding of public official status as to all public school principals irrespective of the circumstances from which the alleged defamation arises.

B

Private Figure/Public Figure Status

Assuming, *arguendo,* that John McIntosh is not a public official by virtue of holding the position of principal of East Canton High School, his conduct and the circumstances of the dispute in which he was engaged clearly justify the alternate conclusion that he had become a limited public figure at the time the alleged defamations occurred.

Public figures "enjoy significantly greater access to the channels of effective communication" and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. *Gertz,* 418 U.S. at 344, 94 S.Ct. at 3009, 41 L.Ed.2d at 808. Any person, regardless

of his or her status as a government employee, may become a limited public figure (as opposed to persons who are public figures for all purposes by virtue of their having obtained great power or influence) as to public issues or controversies into which he or she injects himself. Limited public figures are persons who have invited attention and comment by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz,* 418 U.S. at 345, 94 S.Ct. at 3009, 41 L.Ed.2d at 808.

McIntosh brought legal claims of defamation against two groups of defendants. In *State ex rel. McIntosh v. Osnaburg Local School Dist. Bd. of Edn.,* McIntosh claimed that the superintendent of the local school district, the school board, and the individual members of the school board had defamed him in a written notice delivered to him on March 10, 1995 by the superintendent. The notice stated that his termination was being contemplated based on McIntosh's alleged acts of, *inter alia,* immorality, child endangerment, promoting student unrest, and causing a student boycott of classes. In *ECEA v. McIntosh,* McIntosh asserted that representatives of the school district's teachers' union had defamed him in statements issued to the public on March 13, following a school board discussion of his proposed termination. This discussion occurred in a closed executive session, *despite McIntosh's urgings that the meeting be held in public.*

McIntosh had earlier, in February, been told by the school board, meeting in executive session, that the board was unanimous in its determination that he should be terminated as principal. He was at that time asked to submit his resignation, which he refused to do. Appellants

convincingly argue that McIntosh knew that his position could be salvaged only if the greater community demanded it.

The majority accepts McIntosh's characterization of himself as a private figure as to the controversy that erupted thereafter when his proposed firing became publicly known. It reaches this conclusion despite the fact that McIntosh repeatedly met with members of the press, provided them with comments concerning the public debate surrounding his termination, and allowed a reporter and photographer access to his home, where his photograph was taken, and the photograph published in a March 11 article. McIntosh not only was actively involved in the controversy — described in a newspaper editorial as one that had "consumed the community" — but also his personal future was at its very center.

The majority accepts the premise that McIntosh remained a private figure, even though he shared the contents of the allegedly defamatory termination notice with a news reporter after receiving it. The majority affords McIntosh the protection provided by private figure status despite the fact that McIntosh spoke with members of the press one day after the meeting at which the allegedly defamatory statement was read by the union's representative, and McIntosh was quoted as saying, "I think I have a responsibility to speak out, share my views and get things rectified."

McIntosh clearly attempted to influence the resolution of the public controversy that revolved around him. He acknowledged that shortly after he was told of the board's decision not to renew his contract, it became "public

knowledge" that his job as principal was in jeopardy. He not only had access to media channels of communication but effectively utilized them by affirmatively cooperating with the press. Rather than seeking to protect his privacy regarding his firing, he instructed his attorney to request that the school board's discussions concerning his termination occur in open, rather than executive, session. His attorney accordingly requested the school board, in writing, that "all matters relating to the employment status of Mr. John Richard McIntosh with the Osnaburg Local School District be held in a public hearing."

Having himself participated in the public arena in an attempt to save his job, he must "accept the heat of the fire as part of the price of entering the kitchen." Smolla, *supra,* at 2-22, Section 2.06. Whether he was linked to the actions of students and parents who supported him by participating in civil demonstrations, including student boycotts and ribbon campaigns, is simply not determinative.

The facts surrounding the events at issue in this case cannot logically support the conclusion that McIntosh was a private figure for purposes of a *Gertz* First Amendment analysis. He is a limited public figure as a matter of law. Because McIntosh did not demonstrate that the appellants acted with actual malice in making the alleged defamatory statements, appellants are entitled to reinstatement of the summary judgments awarded them by the trial courts.

I therefore dissent to the second paragraph of the syllabus, and to the judgment.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

*Appendix A*

**LUNDBERG STRATTON, J., dissenting.** I join in Justice Cook's separate opinion and Chief Justice Moyer's dissent, which conclude that R.C. 3319.08 and 3319.11(B) require that the teacher without a written contract offer proof of continuing contract status and proof of acceptance through continued employment with the district. I also join in Chief Justice Moyer's dissent that a public school principal should be found to be a public official for purposes of defamation law.

However, I write separately to address several issues raised regarding the written statement prepared by the representatives of the East Canton Education Association ("ECEA"). For the reasons that follow, I would find, as the trial court did, that the statements were qualified or conditionally privileged communications under the Ohio and federal Constitutions. Further, as such, I would find that Griffith and Slick, as representatives of ECEA, were acting within the scope of their employment and therefore are not individually liable for damages, and the privileged communication did not constitute intentional interference with the employment contract.

*Privileged Communication*

Section 11, Article I of the Ohio Constitution provides, "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." This case presents the court with the task of balancing the free speech rights of Griffith and Slick with the protections afforded McIntosh against defamation.

*Appendix A*

Slick and Griffith asserted the defense of privilege. "A privileged communication is one which, except for the occasion on which or the circumstances under which it is made, would be defamatory, and actionable. The defense of privilege is a matter of public policy in furtherance of the right of free speech." *Costanzo v. Gaul* (1980), 62 Ohio St.2d 106, 108, 16 O.O.3d 134, 135, 403 N.E.2d 979, 981-982.

Further, "[t]he essential elements of a conditionally privileged communication" are (1) "good faith," (2) "an interest to be upheld," (3) "a statement limited in its scope to this purpose," (4) "a proper occasion," and (5) "publication in a proper manner and to proper parties only." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 246, 72 O.O.2d 134, 139, 331 N.E.2d 713, 719, quoting 33 American Jurisprudence (1941) 124-125, Libel and Slander, Section 126. McIntosh appears to dispute only whether the publication was made to proper parties. McIntosh notes that Slick and Griffith published their statement not only to the school board, but also to hundreds of citizens and numerous news reporters who attended the public meeting. The ECEA presented their statement only to the employer board of education. However, McIntosh requested this public forum and insisted that the media had a legitimate interest in the proceedings, so he cannot be heard to complain of the consequences.

I would find that the ECEA representative, Slick, made this statement in good faith and with a common interest to be upheld, *i.e.*, the consequences to ECEA from McIntosh's employment dispute and from McIntosh's failure to adhere to the process bargained for by the union in contract disputes. Further, the statement was limited in its scope to this purpose.

I would also find that the forum, called by McIntosh, was a proper occasion, and the publication was in a proper manner and to proper parties only.

Accordingly, I believe that the statement made on behalf of the teacher employees of the board of education was a qualified or conditionally privileged communication under the Ohio and federal Constitutions. As such, in the absence of ill motive or malice, the privileged statements are protected. See 50 American Jurisprudence 2d (1995) 694-695, Libel and Slander, Section 365. Therefore, I would find that the appellate court erred in concluding that a question of material fact remained as to whether ECEA's statement was protected by qualified privilege such that McIntosh was required to establish actual malice in his defamation claims. Because McIntosh failed to prove actual malice, I would find that the trial court's summary judgment should have been upheld.

*Acting Within the Scope of Employment*

Further, I would find that the ECEA representatives were acting within the scope of their employment and therefore are not individually liable for damages. R.C. 1745.02 provides, "A money judgment against [an] unincorporated *association shall be enforced only against the association as an entity* and *shall not be enforceable against the property of an individual member* of such association." (Emphasis added.) The ECEA is an unincorporated association. Therefore, the court of appeals acknowledged that a judgment rendered against ECEA is against ECEA alone. However, the court of appeals found that the record provided conflicting

testimony as to whether Griffith and Slick were acting within the scope of their employment when they prepared and delivered a statement that McIntosh claims was beyond that which was authorized by the members. I disagree.

"An act of an agent is the act of the principal within the course of the employment when the act can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, and logical result of it." *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 278, 74 O.O.2d 427, 431, 344 N.E.2d 334, 339, citing *Tarlecka v. Morgan* (1932), 125 Ohio St. 319, 181 N.E. 450.

The ECEA, as the *sole voice* of those it represents, see *In re SERB v. Worthington Classified Assn.* (June 7, 1996), SERB No. 96-009, unreported, authorized Griffith and Slick to make a "neutral" statement supporting the process of "nonrenewing a principal's contract." In my view, the statements made by Slick on behalf of the ECEA were just that, supportive of the process employed by the school board. As such, I would find that Griffith and Slick were acting within the scope of their employment and they cannot therefore be held individually liable in a defamation action.

*No Intentional Interference with Contract*

Finally, I would find that the privileged communication did not constitute intentional interference with the employment contract. "In order to recover for a claim of intentional interference with a contract, one must prove (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement

of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 650 N.E.2d 863, paragraph two of the syllabus.

Because I would find that the communication made by the representatives on behalf of ECEA was privileged, the justification prong of *Kenty* is not established. Therefore, I would find that because Griffith and Slick were privileged in making the statement to the board of education, this constitutes justification sufficient to foreclose a tortious interference claim by McIntosh.

In addition, to the extent that McIntosh argues that the statement to the board of education tortiously interfered with his contract to teach, I would find no interference because, as noted earlier, I join in Justice Cook's dissent finding that McIntosh has not demonstrated acceptance of the teaching contract, and, therefore, has not established his teacher tenure status through his Marlington employment.

Accordingly, I join Chief Justice Moyer's dissent from the majority opinion that a public school principal is not a public official for purposes of defamation law; I also join in Justice Cook's separate opinion and Chief Justice Moyer's dissent on the contract status issue; and I dissent separately and would reverse the portions of the judgment that held that summary judgment on the issue of personal liability for Griffith and Slick was improper, and that the trial court erred in granting summary judgment as to all claims of tortious interference with contract.

MOYER, C.J., concurs in the foregoing opinion.

**APPENDIX B — OPINION AND JOURNAL ENTRY OF THE COURT OF APPEALS FOR THE FIFTH DISTRICT, STATE OF OHIO, STARK COUNTY DATED AND FILED MARCH 16, 1998**

STATE OF OHIO, STARK COUNTY
IN THE COURT OF APPEALS
FIFTH DISTRICT

CASE NOS. 97 CA 50
97 CA 56
97 CA 60

STATE EX REL. JOHN R. McINTOSH, ET AL.,

PLAINTIFFS-APPELLANTS,

– VS –

OSNABURG LOCAL SCHOOL DISTRICT
BOARD OF EDUCATION, ET AL.,

DEFENDANTS-APPELLEES,

AND

EAST CANTON EDUCATION ASSOCIATION,

PLAINTIFF-APPELLANT,

– VS –

JOHN R. McINTOSH,

DEFENDANT-APPELLEE.

*Appendix B*

OPINION

| | |
|---|---|
| CHARACTER OF PROCEEDINGS: | Civil Appeal from the Common Pleas Court, Case Nos. 1995CV00475; 1995CV02208 |
| JUDGMENT: | Reversed in Part; Remanded in Part; Modified in Part; Affirmed in Part |

JUDGES:

Hon. Gene Donofrio
Hon. Edward A. Cox
Seventh Appellate District
Sitting by Assignment
Hon. Joseph E. O'Neill, Retired,
Seventh Appellate District
Sitting by Assignment

* * *

COX, J.

This matter presents timely appeals from two separate January 23, 1997 orders rendered by the Stark County Common Pleas Court. In its first judgment entry, the trial court responded to defendant-appellant-East Canton Education Association's declaratory action by reversing the prior decision of defendant-appellant-Osnaburg Local School

District Board of Education, concluding that: (1) plaintiff-appellee, John R. McIntosh, previously obtained tenure status in the Marlington School District; (2) he should be paid as a teacher during the pendency of these actions; (3) he must be offered a continuing contract at such time as a position would be available without dislodging an existing teacher; and (4) until such time as he received and accepted such position, he was not to be included within the present collective bargaining unit and would thereby not be represented by East Canton Education Association. In its second judgment entry, the trial court granted defendant-appellee-Osnaburg's motion for summary judgment as to plaintiff-appellant-McIntosh's breach of contract, defamation and tortious interference claims. Defendant-appellant-East Canton Education Association and defendant-appellant-Osnaburg Local School District Board of Education filed notices of appeal on February 18 and February 24, 1997, case numbers 97-CA-0050 and 97-CA-0060 respectively, from the court's first entry. On February 21, 1997, plaintiff-appellant-McIntosh filed his notice of appeal from the aforementioned second judgment entry of January 23, 1997. This appeal was assigned case number 97-CA-0056.

The background facts of this case are not in issue, as the parties filed Amended Stipulations of Facts on August 6, 1996. According to the facts stipulated, plaintiff-McIntosh (McIntosh) was employed by the Marlington School District as a teacher, then a guidance counselor, under "limited contract" from the 1966-1967 through the 1974-1975 school years. On April 8, 1975, the Marlington School Board voted to offer McIntosh employment under "continuing contract" (tenure). That no written offer, acceptance or contract was

ever executed regarding the "continuing contract" is not disputed. On June 10, 1975, however, Marlington offered McIntosh an administrative position as assistant principal within the district. McIntosh subsequently accepted this position and was employed as an assistant principal under a limited administrative contract within the Marlington School District from 1975 through 1981, and as a principal from 1981 through 1987.

McIntosh accepted a position as assistant principal in the Osnaburg School District at the beginning of the 1987-1988 school year, continuing in this capacity until 1990. From 1990 until 1995, McIntosh was employed as a principal in the Osnaburg School District. In March 1995, defendant-Osnaburg voted to not renew his administrative contract. Osnaburg subsequently hired a new high school social studies teacher to fill a then-existing vacancy, rather than offer the position to McIntosh, who held a lifetime seventh through twelfth grade comprehensive social studies teaching certificate.

McIntosh filed a seven count complaint against defendant-Osnaburg Local School District Board of Education (Osnaburg) on March 17, 1995. In count one of his complaint, McIntosh sought declaratory relief, requesting that the court find: (1) Osnaburg's termination proceedings violated Ohio's open-hearing requirements; and (2) McIntosh had in fact attained tenure status. In count two, McIntosh sought a writ of mandamus for reinstatement, and in count five, he sought injunctive relief. Counts three, six and seven addressed the issues of breach of contract, defamation and tortious interference with contract, respectively. In count

four, appellant asserted a due process violation with respect to the termination/non-renewal process.

On April 4, 1995, the Fifth District Appeals Court (Ninth District sitting by assignment) reversed the trial court's decision as to count one, holding that Osnaburg did not violate Ohio's sunshine laws.

On November 7, 1995 the trial court filed a judgment entry ordering McIntosh's reinstatement as a teacher at an annual salary of $37,657, together with appropriate benefits, to be paid during the pendency of the proceedings.

On December 22, 1995, defendant-appellant, East Canton Education Association (ECEA), filed a declaratory action, requesting the court to make a determination as to whether McIntosh had in fact attained "tenure" status. ECEA joined Osnaburg as defendant for the purpose of ensuring that they would be bound by the court's decision regarding this issue. McIntosh filed a counterclaim for defamation against ECEA, joining Mary Jane Slick of the OEA and Susan Griffith of the ECEA, individually and in their representative capacities, as third party defendants. The trial court consolidated these actions with McIntosh's initial complaint.

On January 23, 1997, the trial court filed the above referenced two separate entries with respect to these matters. These appeals followed.

Since appellant-ECEA's sole assignment of error and appellant-Osnaburg's first assignment of error are substantively the same, they will be addressed together. ECEA's first assignment of error provides:

*Appendix B*

> "The trial court erred in concluding that appellee obtained continuing contract status in the Marlington Local School District and, therefore, was eligible for continuing contract status as a teacher in the Osnaburg Local School District."

Osnaburg's first assignment of error provides:

> "The trial court erred in its judgment entry of January 23, 1997 when it concluded that appellee McIntosh obtained continuing contract status in the Marlington School District."

The issue in the present matter is whether McIntosh, upon the non-renewal of his administrative contract by the Osnaburg School Board at the end of the 1994-1995 school year, was entitled to a continuing service teaching contract in Osnaburg by virtue of having previously attained continuing contract status in the Marlington School District. This issue can only be reached upon a determination of whether McIntosh in fact attained continuing service status as a teacher when the Marlington School Board voted to offer him such status on April 8, 1975. If it is determined that McIntosh attained such status, we must next determine if he subsequently waived his statutory right of continuing service by accepting the limited administrative contract offered by the Marlington School Board on June 10, 1975. If it is determined that McIntosh had attained continuing contract status in Marlington and had not waived such status by subsequently accepting the administrative contract, we must finally determine whether such status transferred to Osnaburg, and if so, whether McIntosh was automatically

entitled to a continuing contract in that district as an operation of law subsequent to Osnaburg's non-renewal of his administrative contract.

The parties do not dispute that McIntosh was statutorily "eligible" for continuing contract status in 1975, nor that the Marlington School Board in fact voted, upon recommendation of the superintendent, to offer such status to McIntosh. Appellants' assertion that McIntosh did not affirmatively accept the continuing status offer is not disputed. The primary focus of appellants' challenge regards the court's reliance on the "presumptive acceptance" provision of the 1996 version of R.C. 3319.11, instead of the version in effect at the time of the Marlington School Board action in 1975. As such, they contend that McIntosh's circumstances did not meet the requirements of the "distinct factual scenarios" set forth in the latter portion of the statute, thereby rendering the "presumptive acceptance" provisions inapplicable. Upon review of the respective versions of R.C. 3319.11, we conclude that application of either version would lead to the same result, as the presumption exists under each version.

The pertinent portion of the 1975 version of R.C. 3319.11 provides:

> "Upon the recommendation of the superintendent that a teacher eligible for continuing status be re-employed, a continuing contract shall be entered into between the board and such teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of

> the superintendent. The superintendent may recommend re-employment of such teacher, if continuing status has not previously been attained elsewhere, under a limited contract for not to exceed two years * * * If the board of education does not give such teacher written notice of its action on the superintendent's recommendation of a limited contract for not to exceed two years before the thirtieth day of April, such teacher is deemed re-employed under a continuing contract at the same salary plus any increment provided by the salary schedule. Such teacher is presumed to have accepted employment under such continuing contract unless he notifies the board in writing to the contrary on or before the first day of June, and a continuing contract shall be executed accordingly."

The remaining portion of this version of R.C. 3319.11 addresses three factual scenarios which are clearly only implicated upon written notice being provided to the eligible teacher of the board's intention to not offer a continuing contract pursuant to a recommendation by the superintendent or by vote of the board rejecting the superintendent's recommendation to offer such a contract. Only upon such expressed affirmative conduct will a teacher be presumed to accept (1) re-employment under additional limited contract; (2) re-employment under continuing contract after completion of probationary period under extended limited contract; or (3) re-employment under limited contract for a teacher ineligible for continuing status.

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Pursuant to this version of R.C. 3319.11, it is clear that once a teacher has become eligible for continuing teacher status by virtue of certification and years of *teaching* in the district, or years of *service* if eligibility was attained in another district, (s)he is *entitled* to a continuing teaching contract *unless* the superintendent or the board takes affirmative action to the contrary and provides the teacher with written notice of this contrary intent. Where the board fails to adhere to these clearly defined procedural requirements, it is *compelled* to enter into a continuing teaching contract with the teacher upon determining such teacher has attained eligibility. Absent a written declination of the continuing teaching contract offer by a teacher who has attained eligibility, it is presumed that the eligible teacher has accepted such an offer, regardless of whether the offer has been set to writing or otherwise formalized by the board.

The 1996 version of R.C. 3319.11(B)(1), upon which appellants assert the trial court improperly relied, in part provides:

> "Upon the recommendation of the superintendent that a teacher eligible for continuing service status be reemployed, a continuing contract shall be entered into between the board and the teacher unless the board by a three-fourths vote of its full membership rejects the recommendation of the superintendent. If the board rejects by a three-fourths vote of its full membership the recommendation of the superintendent that a teacher eligible for continuing service status be reemployed and the superintendent makes no recommendation to the board pursuant to division

(C) of this section [extended limited contract for not more than two years, where any subsequent reemployment of teacher would be by continuing service contract], the board may declare its intention to not reemploy the teacher by giving the teacher written notice on or before the thirtieth day of April of its intention not to reemploy the teacher. If evaluation procedures have not been complied with pursuant to division (A) of section 3319.111[3319.11.1] of the Revised Code or the board does not give the teacher written notice on or before the thirtieth day of April of its intention not to reemploy the teacher, the teacher is deemed reemployed under an extended limited contract for a term not to exceed one year at the same salary plus any increment provided by the salary schedule. The teacher is presumed to have accepted employment under the extended limited contract for a term not to exceed one year unless the teacher notifies the board in writing to the contrary on or before the first day of June, and an extended limited contract for a term not to exceed one year shall be executed accordingly. Upon any subsequent reemployment of the teacher only a continuing contract may be entered into."

Short of more clearly defining the options available to the superintendent and the board in the event they desire to take the affirmative procedural steps necessary to deny a continuing contract to an eligible teacher, we cannot conclude that this version of R.C. 3319.11 in any way increases or erodes a teacher's rights to such a contract, nor does it

increase or decrease the board's affirmative duties within this context. Simply put, if the superintendent or board do nothing, the eligible teacher is entitled to a continuing teaching contract, and is presumed to accept such contract absent written declination thereof. If the superintendent recommends to not reemploy the eligible teacher, and the board concurs, written notice of such must be provided to the teacher. The same is true if the board disagrees with the superintendent's recommendation to reemploy, whether under a limited or continuing contract.

Under either version of R.C. 3319.11, once a teacher attains eligibility for continuing contract status, the board is compelled to offer such a contract unless it takes the affirmative procedural steps to either deny reemployment or offer reemployment pursuant to a limited contract. To attain eligibility in a district, a teacher must be certified and either have taught in that district for three of the last five years or, if continuing teaching status had been previously attained in another district, have *served* within the second district for two years. Absent providing the eligible teacher with written notice of an intent to not reemploy or reemploy under a limited or extended limited contract, R.C. 3319.11 states that a continuing teaching contract *shall* be offered to eligible teachers. This is not discretionary language.

Upon a review of the record and for the reasons set forth above, we must agree with appellee-McIntosh that he was eligible for continuing service status with Marlington in 1975, that the Marlington School Board voted to offer him such status, and that by not affirmatively rejecting the offer prior to June 1 1975, he was deemed to have presumptively

accepted the offer of such status on that date, regardless of which version of R.C. 3319.11 is applied. By requiring a teacher to present a written rejection of such an offer prior to a fixed date (June 1), the legislature has clearly placed the burden of all affirmative acts in such a matter on the school boards. Because the language of R.C. 3319.11 *entitles* an eligible teacher the continuing contract status, it is incomprehensible to imagine a circumstance where an eligible teacher would be inclined to reject such a valuable lifetime property interest. It would be illogical to construe the statute in such a manner that would subject the teacher to forfeiture of continuing teacher status for failure to affirmatively act upon the obvious. It is therefore our conclusion that McIntosh had in fact attained continuing teaching status in the Marlington School District in 1975.

The next issue we address is whether McIntosh waived this status by subsequently accepting a limited administrative contract in Marlington. Appellee contends that even upon acceptance of the subsequent limited administrative contract, he retained his continuing service status pursuant to R.C. 3319.02(C), which provides:

> "When a teacher with continuing service status becomes an assistant superintendent, principal, assistant principal, or other administrator with the district or service center with which he holds continuing service status, he retains such status in his non-administrative position as provided in sections 3319.08 and 3319.09 of the Revised Code."

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The parties agree that McIntosh was eligible for continuing contract status in Marlington and that he was offered such a contract by the Marlington School Board. Appellants assert, however, that McIntosh's acceptance of the administrative contract, subsequent to the boards vote to offer him continuing service status, served as a rejection of that offer, thereby waiving his statutory rights to that status. Appellants contend that even if the court properly construed the "presumptive acceptance" provision as being applicable and dispositive to McIntosh's acceptance of continuing service status, his subsequent execution of the administrative contract with the same party served to waive the prior teaching contract. *Helle v Landmark, Inc.* (1984), 15 Ohio App.3d 1. We disagree.

In support of this argument, appellants cite to *State, ex rel. Johnston v Cincinnati Board of Education* (1979), 64 Ohio App.2d 146, where the court held that a teacher otherwise entitled to automatic reemployment under 3319.11 had waived his right to the statutorily required one year contract by subsequently accepting a one month teaching contract with the same board, reasoning that the contracts were "patently different".

Appellants also cite to *Kehoe v Brunswick City School District Bd. of Edn.* (1983), 24 Ohio App.3d 51, where the court held that a tutor who subsequently signed an alternative employment contract as a substitute teacher with the same board was deemed to have waived her statutory right to have her tutoring contract renewed, since she could not be both tutor and substitute teacher.

Finally, appellants cite to *State, ex rel. Davis v Meister* (May 2, 1984), Summit App. No. 11463, unreported, where the court held that an individual who served in several administrative capacities and who had become eligible for, but never attained, continuing service status while in these capacities, was not entitled to be offered a continuing teaching contract upon the non-renewal of his limited administrative contract. The Court of Appeals concluded that Davis, who held a continuing service contract with one district, but who subsequently entered into a limited administrative contract in another district, though eligible for continuing service by virtue of having been certified, did not attain continuing service status in the second district because he never held a position in which he was eligible for a continuing contract in that district. Concluding that Davis' acceptance of the limited administrative contracts prevented his eligibility from developing into a continuing contract by operation of law, the appellate court specifically addressed and rejected Davis' assertion that this eligibility automatically matured into a continuing teacher contract upon non-renewal of his contract as principal.

*Johnston* and *Kehoe*, supra, are distinguished from the present case since neither of those cases dealt with a teacher who was granted continuing service status prior to accepting an administrative post. It is our opinion that *State, ex rel. Kelly v Bd. of Ed. of Clearcreek Local School District* (1990), 52 Ohio St.3d 93, decided after *Johnston*, *Kehoe* and *Davis*, is more representative of the Ohio Supreme Court's current position on the issues herein. In *Kelly*, the Court determined that pursuant to R.C. 3319.11(B), a certified teacher, who attained continuing service status in one school district, and

who had served at least two years as an administrator in a second school district, was entitled to a continuing service contract as a teacher in the second school district upon non-renewal of the administrative contract. It is important to note that the Court of Appeals for Warren County found its judgment in *Kelly* in conflict with that of the Court of Appeals for Summit County in *Davis*. In affirming the judgment of the court of appeals in *Kelly*, the Supreme Court expressly rejected the decision rendered by the Summit County Court of Appeals in *Davis*.

Based upon the Ohio Supreme Court's opinion in *Kelly* and our review of the language of R.C. 3319.02 (Employment of administrators, supervisors, and special teachers) we must accept the premise that it is the clear intent of the state legislature to allow teachers to accept administrative positions without jeopardizing their continuing service status as teachers.

Appellants' assertion that McIntosh subsequently waived his right to continuing service status upon accepting the administrative position is unfounded and contrary to the Supreme Court's construction of the applicable statutes as set forth in *Kelly*, supra. In the present matter, such a requirement would have required McIntosh to accept the continuing service contract as a teacher, begin the 1975-1976 school year as a teacher under a continuing service contract, and then accept the administrative contract once the school year had begun. Though not determinative to our conclusions herein, it appears that McIntosh did not in fact execute the limited teacher's contract for the administrative post until September 2, 1975. (Appellant-Osnaburg's brief, App. 31).

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Since the 1975-1976 school year statutorily begins on July 1, and no evidence was presented to show that McIntosh rejected the offer prior to June 1, it would appear that McIntosh in fact did begin the 1975-1976 school year under the continuing service contract. For these reasons, we conclude that McIntosh did not waive his continuing teaching status upon subsequently accepting the limited administrative contract.

Having determined that McIntosh had in fact attained, and did not subsequently waive, continuing teaching status in Marlington, we must now address the central issue presented in this case as to whether McIntosh was, by virtue of this status, entitled to a continuing teaching contract in the Osnaburg School District upon the non-renewal of his administrative contract at the end of the 1994-95 school year. Though an eligible teacher is statutorily entitled to such status, the Ohio Revised Code neither expressly nor impliedly indicates any presumption of eligibility. In recognition of the State's commitment to quality education, as well as the value continuing contract status bestows upon a teacher, we are constrained to conclude the legislature intended that a continuing teaching contract cannot arise until such time as the board has made a determination as to the teacher's eligibility pursuant to the statutory requirements of R.C. 3319.08 and R.C. 3319.11.

We therefore conclude that when a teacher acquires continuing contract status in a district other than the one in which a continuing contract is now being sought, such continuing contract status in the new district does not arise by mere operation of law, but only upon subsequent

affirmative conduct by the teacher notifying the school board in which (s)he seeks continuing contract status as to his/her eligibility for such status and upon a positive determination of eligibility by such school board. In other words, the school board will only be bound to offer a continuing contract to such a teacher, pursuant to the mandatory provisions of R.C. 3319.11, upon receiving such affirmative notice and upon determining that the teacher is in fact statutorily eligible for such status.

In the present matter, the Osnaburg School District made a determination, based upon their interpretation of state law, that McIntosh was not eligible for continuing contract status in that district. Based upon the mobility of today's workforce, and as a matter of practicality, we cannot conclude that the state legislature intended to place the entire affirmative burden of discerning whether McIntosh had satisfied his statutorily required teaching requirements in another school district upon Osnaburg. As it is uncontested that McIntosh never held a teaching contract in Osnaburg, and the Revised Code neither expresses nor implies any legislative intent that such qualifications be presumed, we do not find Osnaburg's determination of ineligibility unreasonable under the specific circumstances of this case. We conclude that Osnaburg was not bound by the mandatory provisions of R.C. 3319.11 to offer McIntosh a continuing contract absent provision of sufficient evidence to determine McIntosh was in fact eligible for such status. However, once the trial court determined as a matter of law that McIntosh was eligible for continuing contract status upon non-renewal of his administrative contract, we conclude that the trial court properly applied the mandatory provisions of the statute retroactively to the beginning of the 1995-96 school year.

For these reasons we overrule appellant-ECEA's and appellant-Osnaburg's first assignments of error and affirm the decision of the trial court.

Appellant-Osnaburg's second assignment of error provides:

> "Even if appellee McIntosh has obtained a continuing contract of employment as a regular teacher in the Osnaburg Local School District, the trial court erred in ordering appellant board of education to pay appellee full compensation and benefits since July of 1995 while failing to place appellee within the bargaining unit of teaching employees and failing to subject appellee to the collective bargaining agreement until the 1997-98 school year."

Neither state law nor the collective bargaining agreement at issue in the present matter requires a teacher to be a member of the collective bargaining unit. Article VII of the collective bargaining agreement provides in pertinent part that, "The Board shall deduct from the pay of members of the collective bargaining unit *who elect not to become or to remain members* of the Association. . . ." [Emphasis added]. We can but conclude from this language that the parties to this bargaining agreement contemplated the possibility that certain members of the bargaining unit would not be members of the bargaining association. It is also our opinion that until such time as McIntosh is provided a teaching position within the district, his community of interest with members of the unit is sufficiently distinct to justify temporary exclusion.

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Based upon our review of the record, we must conclude that the trial court's decision to exclude McIntosh from the collective bargaining agreement was justified and proper due to the amendment of Article XIX of the agreement, made after McIntosh brought this action and shortly before the court's decision to reinstate him. That amendment provides that an employee who's administrative contract is not renewed could not be reemployed as a teacher if such employment would cause the displacement of a teacher with less seniority. In light of the pervasive animus reflected throughout these proceedings, we are inclined to accept the proposition that this amendment was made in anticipation of, and in an effort to thwart, the court's order. Though the decision of the trial court may in fact be unprecedented, we find no merit in appellants' argument that such a decision in any way usurps the ability of the employer to determine the terms and conditions of employment.

Appellant has presented no evidence or referenced any statute requiring membership in the collective bargaining unit, nor of the financial burden an order of reinstatement would cause to the district. Appellee's discussion of the court's purpose for excluding McIntosh from the bargaining agreement is well founded. For these reasons it does not appear that the trial court erred in its decision.

Appellant's second assignment of error is without merit and is overruled.

Appellant-Osnaburg's third assignment of error provides:

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"The trial court erred in determining appellee McIntosh is to be compensated as a teacher by the Osnaburg Local School District in the amount of $37,657."

Appellant contends that since McIntosh's administrative contract expired at the end of the 1994-1995 school year (June 30, 1995), any compensation due during court proceedings should be based on the teacher's pay scale, commensurate with his level of experience, and not an administrative pay scale.

R.C. 3317.14 requires individual school districts to establish annual teachers' salary schedules. These schedules must provide that no teacher receive less than the minimum pay set forth in R.C. 3317.13 and be provided with full credit for a minimum of five years of actual teaching experience. Pursuant to R.C. 3317.13, a "new" teacher in a district shall not be credited for more than ten years experience. Under the schedule set forth in R.C. 3317.13, a teacher with McIntosh's level of experience (Masters + 10) would be entitled to a minimum salary of $26,775 annually.

*Greco v Roper* (1945), 145 Ohio St. 243 grants broad statutory powers to a school board in the conduct and management of their school district. Within these broad powers is discretion in classifying a teacher within applicable salary schedules. Since McIntosh never taught in the Osnaburg School District, we would be inclined to agree that it was within appellants' discretion to determine his compensation level as that of a "new" teacher within the district.

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Article XXI of the collective bargaining agreement sets forth Osnaburg's schedule pursuant to R.C. 3317.14. Under Article XXI, a teacher with McIntosh's credentials (Masters + 15 hours) granted the statutory minimum of five years of experience, if treated as a "new" teacher to the district, would be entitled to an annual salary of $26,229. Since this figure fell below the statutory minimum as prescribed by R.C. 3317.13, appellant credited McIntosh with six years of experience, thereby placing him at a salary of $27,353 annually.

The record clearly reflects that McIntosh has over twenty-nine years of actual teaching service. Classification of a teacher on the salary schedule is, however, a matter of discretion reserved to the school board, constrained only by the minimums set forth by R.C. 3317.13. R.C. 3317.13(B) only requires that full credit be given "pursuant to this section [3317.13] and section 3317.14," not pursuant to a collective bargaining agreement. In consideration of this and the fact that the salary proposed by appellant exceeds the statutory minimum set forth by R.C. 3317.13 for a person of McIntosh's level of experience, we cannot conclude that appellant would be statutorily obligated to give McIntosh full credit for his actual years of service.

Since the issue of McIntosh's reinstatement was a question of law, the trial court properly decided that issue without deference to the Osnaburg Board. The question of where to classify him upon the statutory or collective bargaining salary schedule was, however, an administrative issue expressly delegated by statute to the local board of education. In light of the substantive legal issue at the core

of the trial court's order, and the parties' focus upon this issue of law in their arguments, we cannot conclude that Osnaburg waived its administrative authority by failing to simultaneously present its proposal as to the administrative issue.

Having concluded that Osnaburg was not statutorily bound to credit McIntosh for his actual years of service, and that it was within Osnaburg's discretionary authority to classify him as a new teacher within the district, we conclude that Osnaburg's proposal was reasonable and valid, and therefore due deference upon review.

Though the dual nature of the trial court's order precluded Osnaburg from presenting its proposal to the trial court, it was properly brought before this Court. In consideration of the aforementioned legislative intent and in the interests of justice, we therefore modify the trial court's decision so as to comply with the evidence, and set the salary at $27,353.00.

Appellant's third assignment of error is with merit and is modified.

Plaintiff-appellant-McIntosh sets forth two assignments of error in his appeal. The first assignment provides:

> "The trial court erred in summarily dismissing plaintiff McIntosh's defamation claims."

In granting Osnaburg's motion for summary judgment pursuant to Civ. R. 56, the trial court reasoned that the

statements made by defendants during the course of these proceedings were absolutely privileged since they were made while executing a governmental function. The court also noted that since McIntosh was responsible for publication of documents related to these proceedings, he was precluded from proving an essential element of defamation as to these documents. Finally, the trial court determined that an open letter to the public published by Osnaburg was a protected expression of opinion, and therefore not subject to a defamation claim.

Civ. R. 56(C) recites, in pertinent part:

> "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."

As set forth by the Ohio Supreme Court in *Welco Industries, Inc. v Applied Companies* (1993), 67 Ohio St.3d 344, 346:

> "Under Civ. R. 56, summary judgment is proper when '(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgement as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and

> viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.' (Citation omitted). Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party. (Citation omitted). Nevertheless, summary judgment is appropriate where a plaintiff fails to produce evidence supporting the essentials of its claim. (Citation omitted)."

The Ohio Supreme Court in *Dresher v Burt* (1996), 75 Ohio St.3d 280, 293 held:

> "The moving party cannot discharge its initial burden under Civ. R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims."

The Ohio Supreme Court in *Dresher*, supra, further held that once the moving party has met its initial burden, the nonmoving party must then produce any evidence for which such party bears the burden of production at trial. In reviewing a trial court's decision to grant summary judgment, a court of appeals must conduct a *de novo* review of the record. *Renner v Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326.

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On August 18, 1997, the Fifth District Court of Appeals (Ninth District sitting on assignment) issued a thirty-nine page decision wherein they determined that the trial court erred in granting the summary judgment motions of ECEA, Slick and Griffith as to three of the six passages set forth in McIntosh's defamation claims against those parties. *East Canton Education Association v John R. McIntosh v Mary Jo Slick* (Aug. 18, 1997), Stark App. No. 97-CA-0293, unreported. In that opinion, the appellate court determined McIntosh was not a public figure, and was therefore not required to prove the element of malice in his defamation claims. The appellate court then proceeded to apply a defamation analysis to each passage referenced in McIntosh's claim. Since the parties herein, Osnaburg and the individual members of the Osnaburg Board, were not a party to that action, the merits of McIntosh's separate and unrelated defamation claims against them were not reached in that appellate review.

In consideration of the appellate court's prior determinations of law in *East Canton Education Association, supra*, and upon a thorough review of the record of this case in a light most favorable to the non-moving party, we must conclude that appellees failed to satisfy their burden under *Dresher* that there were not genuine issues of material fact as to whether statements made during the administrative proceedings were absolutely privileged, whether McIntosh was responsible for the initial publication of documents related to these proceedings and thereby precluded from proving an essential element of defamation, or whether such statements were protected expressions of opinion.

For these reasons, we find appellant-McIntosh's first assignment of error well taken. So as to assure a consistent application of law within the context of the separate defamation claims, we reverse the decision of the trial court and remand the issues set forth in this assignment for the purpose of making factual determinations thereof, within the analytical framework set forth in *East Canton Education Association*, *supra*, and consistent with the determinations of law made therein.

Plaintiff-appellant-McIntosh's second assignment of error provides:

> "The trial court erred in dismissing plaintiff McIntosh's breach of contract cause of action."

On January 13, 1997, the Fifth District Court of Appeals (Ninth District sitting on assignment) filed a decision specifically addressing and overruling the arguments of appellant-McIntosh regarding the breach of contract issue relative to the administrative contract. *State ex rel. John R. McIntosh v Osnaburg Local School District* (Jan. 13,1997), Stark App. No. 95-CA-0357, unreported. Since it is our opinion that the breach of contract issue regarding the administrative contract has been completely and fully litigated on the merits and adequately reviewed at the appellate level, we decline to revisit that issue under the principle of res judicata.

As a separate issue, the trial court sustained Osnaburg's summary judgment motion relative to McIntosh's breach of contract claim regarding the continuing teaching contract,

determining that since no continuing teaching contract existed, no breach of contract could have occurred. For the reasons we set forth in addressing appellant-ECEA's sole assignment of error and appellant-Osnaburg's first assignment of error we agree with the trial court. Appellant-McIntosh's second assignment of error is without merit and is overruled.

Appellant-ECEA's sole assignment of error is found to be without merit.

Appellant-Osnaburg's first and second assignments of error are found to be without merit. Appellant-Osnaburg's third assignment of error is with merit.

Appellant-McIntosh's first assignment of error is found to be with merit. Appellant-McIntosh's second assignment of error is found to be without merit.

The judgment of the trial court is reversed and the cause is remanded for further proceedings according to law and consistent with this opinion.

Donofrio, P.J.,
O'Neill, J.,

APPROVED:

s/ Edward A. Cox
EDWARD A. COX, JUDGE

*Appendix B*

IN THE COURT OF APPEALS OF OHIO
FIFTH DISTRICT

STATE OF OHIO )
)
STARK COUNTY ) SS:

CASE NOS. 97 CA 50
97 CA 56
97 CA 60

STATE EX REL. JOHN R. McINTOSH, ET AL.,

PLAINTIFFS-APPELLANTS,

– VS –

OSNABURG LOCAL SCHOOL DISTRICT
BOARD OF EDUCATION, ET AL.,

DEFENDANTS-APPELLEES,

AND

EAST CANTON EDUCATION ASSOCIATION,

PLAINTIFF-APPELLANT,

– VS –

JOHN R. McINTOSH,

DEFENDANT-APPELLEE.

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JOURNAL ENTRY

These appeals have been reviewed together and a single opinion issued as a matter of judicial economy. This order incorporates all three appeals and is the final judgment in each appeal.

For the reasons stated in the opinion rendered herein, it is the final judgment and order of this Court that the judgments of the Common Pleas Court of Stark County, Ohio, is affirmed in part, modified in part, reversed in part and remanded for further proceedings.

Appellant East Canton Education Association's sole assignment of error and Osnaburg Local School District Board of Education's first assignment of error, discussed together, are found to be without merit and are overruled.

Appellant Osnaburg Local School District Board of Education's second assignment of error is found to be without merit and overruled.

Appellant Osnaburg Local School District Board of Education's third assignment of error is sustained and it is hereby ordered that appellee John R. McIntosh be placed on a schedule that meets the State maximum annual salary of $27,353.00, based on his credentials and years of experience.

Appellant John McIntosh's first assignment of error is sustained and the judgment of the trial court is reversed and this cause is remanded for further proceedings consistent with *East Canton Education Association v. Slick* (Aug. 18, 1997), Stark App. No. 97 CA 0293, unreported.

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Appellant John McIntosh's second assignment of error is found to be without merit and overruled.

We find reasonable cause for the appeals filed herein.

Each party to bear its costs.

s/ Edward A. Cox

s/ Gene Donofrio

s/ Joseph E. O'Neill
JUDGES.

**APPENDIX C — DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS FOR THE FIFTH JUDICIAL DISTRICT DATED AND FILED AUGUST 18, 1997**

IN THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT

STATE OF OHIO )
) ss:
COUNTY OF STARK )

C.A. NO. 96-CA-0293

EAST CANTON EDUCATION ASSOCIATION

Appellee

v.

JOHN R. MCINTOSH, et al.

Appellants

APPEAL FROM JUDGMENT ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF STARK, OHIO
CASE NO. 1995CV02208-1

DECISION AND JOURNAL ENTRY

Dated:

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

*Appendix C*

BAIRD, Judge.

Plaintiff-Appellant, John R. McIntosh ("McIntosh"), appeals the order of the Court of Common Pleas of Stark County granting summary judgment to Appellees, the East Canton Education Association ("ECEA"), Sharon Griffith ("Griffith"), Mary Jo Slick ("Slick"), and the Ohio Education Association ("OEA") on McIntosh's claims for defamation and tortious interference with employment contract. We affirm in part and reverse in part.

ECEA is the collective bargaining representative for the certificated teaching employees in the Osnaburg Local School District (the "District"). The District's Board of Education ("Board") employed McIntosh under an administrative contract as the District's high school principal for the 1994-1995 school year.

On March 13, 1995, the Board voted to suspend McIntosh and to commence proceedings to terminate him. Three days later, the Board notified McIntosh by letter of its intent to consider his termination and suspended him without pay. The Board stated that it was proceeding under the statutory grounds for termination set forth in R.C. 3319.16, "which authorizes contract termination for 'gross inefficiency [or] immorality[; for] willful and persistent violations of reasonable regulations of the board of education[; or for] other good and just cause.' "[1]

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1. R.C. 3319.16 also sets forth the "procedure" to be followed in terminating a teacher. For purposes of this statute, "teacher" includes a "principal." R.C. 3319.09(A).

*Appendix C*

On December 22, 1995, ECEA filed a complaint for a judgment declaring that McIntosh was not a tenured teacher in the District and, if necessary, an injunction directing the Board to refrain from treating McIntosh as a tenured teacher represented by the ECEA.[2]

McIntosh counter-claimed for breach of ECEA's duty to represent him, defamation, and tortious interference with employment contract. McIntosh also brought claims alleging defamation and tortious interference with employment contract against new party defendants on the counter-claim, the OEA; Griffith, president of ECEA; and Slick, a labor relations representative for OEA who was assigned to work in an advisory capacity with ECEA. The claims against Griffith and Slick were in both their individual and representative capacities.

Appellees moved for summary judgment with respect to McIntosh's claims and counterclaims. In considering the summary judgment motion, the court had before it the affidavits and depositions of McIntosh, Griffith, and Slick, the affidavits of two ECEA members, and the deposition of District Superintendent Dr. George McGuire.

The record discloses that, on March 1, 1995, McGuire told McIntosh that he was recommending that the Board not renew McIntosh's contract as principal. Eight days later, McGuire ordered McIntosh to vacate his office and to remain on home assignment. McGuire also informed McIntosh that

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2. ECEA later amended its complaint to add the Board as a defendant.

if he returned to the school, he would be considered a trespasser.

On March 10, 1995, McGuire delivered a notice to McIntosh advising that he was going to recommend that McIntosh's current contract "be suspended and/or terminated":

> Please be advised that it is my intention to recommend to the Osnaburg Local Board of Education that your teaching/administrative contract(s) with the District be suspended and/or terminated for gross inefficiency, immorality, willful and persistent violations of reasonable regulations of the Board of Education, and other good and just cause, including but not limited to your ineffectiveness in maintaining appropriate student discipline in the High School, to the great detriment of the learning process, student safety, and teacher morale, * * * [and] condoning and/or promoting student unrest at your building for the purpose of advancing your personal employment concerns, resulting in an unconscionable risk of physical harm to students and significant disruption of academic activities[.]

On the day McIntosh received the notice, Griffith called a meeting of the ECEA. According to Griffith's affidavit, ECEA members voted at that meeting "to issue a public statement addressing McIntosh's actions." Griffith read "this authorized statement" to the Board and several hundred

members of the community at the Board's March 13, 1995, meeting. The statement[3] included the following passages:

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3. The entire statement read as follows:

My name is Sharon Griffith and I am President of the East Canton Educators' Association. I am here tonight specifically authorized by our membership to address you on their behalf and to express their views on the recent events in our district. In fact, the vote of our teachers was overwhelming — only 4 no votes from the entire staff.

It is with great sadness that the staff here tonight felt it necessary to take the unusual step of publicly entering this debate. **Let there be no doubt, the ECEA supports the recommendation of the Superintendent and urges this Board to do the same.**

This issue never was, and should not have become, one that was personalized around one individual. Mr. McIntosh IS NOT the issue here tonight. Rather, the issue is whether or not representative democracy is alive and well in this district or shall we be governed hereafter by mob rule.

The people here tonight DO NOT represent the East Canton community. They can only represent themselves. While they are certainly entitled to their opinions, they are elected by no one and accountable to no one. On the other hand, this Board was elected by the entire community and is accountable at the ballot box. That is the democratic process that has made this country great and protected the silent majority from small vocal self-interest groups such as those here tonight.

The proper function of any school board is to develop a philosophy of education that will guide the district and then to hire

(Cont'd)

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(Cont'd)
the very best Superintendent to lead the school team. As in any team undertaking, there can only be one leader — one quarterback. Otherwise, what you have is chaos. This Board has selected its leader — Dr. McGuire.

Who in this room tonight is trained, experienced and authorized by law to evaluate John McIntosh? Only Dr. McGuire. Who in this room tonight knows ALL the facts and circumstances surrounding the performance of this principal, not just what he has chosen to share? Dr. McGuire and the Board. On what basis could the group of people here tonight possibly substitute their judgment for that of the Superintendent and the Board? If the Board surrenders to making personnel decisions to those who show up and yell the loudest, they and this community can plan on this type of disruptive spectacle at every Board meeting. And worst of all, what type of lessons are we teaching our children about respect for authority and process?

As I said a minute ago, this issue should never have been personalized. However, Mr. McIntosh has chosen to do so. When discussing the Board's charge that he had problems with disciplining students, he was quoted in the newspaper as blaming "weak teachers." I have personally reviewed every evaluation of each high school teacher. There is not one criticism of any of the teachers, by Mr. McIntosh or any other evaluator, regarding student discipline.

For Mr. McIntosh to attempt to blame our high school staff for his alleged inadequacies is unconscionable. The major job of a principal should be to properly and fairly evaluate teachers. If the staff in this district was "weak in discipline," it was Mr. McIntosh's job to evaluate, record and deal with the problem. He either failed to do so, or was less than honest when he made his statement to the press. **How could this Board or community ever expect our staff to work for Mr. McIntosh as their supervisor or even with him as a fellow teacher after such a self-serving attack?**

(Cont'd)

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I am here tonight specifically authorized by our membership to address you on their behalf and to express their views on the recent events in our district.

**Let there be no doubt, the ECEA supports the recommendation of the Superintendent and urges this Board to do the same.**

* * *

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(Cont'd)

There are laws in this State that provide Mr. McIntosh or any school employee with certain due process rights. The Association supports such a procedure. If, in fact, he has truly been treated unfairly or illegally, why then did Mr. McIntosh not use the proper process? It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district.

Tonight it is this Board of Education that will be the teacher. By your actions and decisions what shall you teach us? Shall this community, staff and students learn from you that protest signs, name-calling, manipulation of the media and students, and angry crowds shall define the decision-making process for the Osnaburg Local School district?

Rather, the professional staff of the East Canton School District hopes that the lesson we learn from you tonight is that in a civilized society, the silent majority, representative democracy, accountability, and the proper process are important. We owe our children no less. Please support the process — please allow this Superintendent to do the job for which you hired him.

(Emphasis *sic.*)

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> When discussing the Board's charge that he had problems with disciplining students, [McIntosh] was quoted in the newspaper as blaming "weak teachers." I have personally reviewed every evaluation of each high school teacher. There is not one criticism of any of the teachers, by Mr. McIntosh or any other evaluator, regarding student discipline.
>
> * * *
>
> **How could this Board or community ever expect our staff to work for Mr. McIntosh as their supervisor or even with him as a fellow teacher after such a self-serving attack?**
>
> There are laws in this State that provide Mr. McIntosh or any school employee with certain due process rights. The Association supports such a procedure. If, in fact, he has truly been treated unfairly or illegally, why then did Mr. McIntosh not use the proper process? It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district.

(Emphasis *sic.*)

At her deposition, Griffith testified that ECEA members voted to support the "process" under which any individual's contract would be "nonrenewed" and did not vote to support either the Superintendent's specific recommendation

regarding McIntosh or the non-renewal of McIntosh's contract. According to Griffith, the members did, however, vote to address comments McIntosh had made to the newspaper regarding weak teachers or weak faculty members. Slick wrote the statement, Griffith made "a few" grammatical changes, and Griffith delivered the statement to the Board at its March 13, 1995, meeting. Griffith testified that she knew the statement meant ECEA did not want McIntosh to stay on as principal, despite the fact that many members had shown support for McIntosh during the ECEA meeting. When asked about the passage regarding McIntosh's exploitation of students, Griffith stated that the only way in which she was aware that McIntosh had "exploited" students was the appearance of reporters at the school during school hours. She had no knowledge that McIntosh condoned, encouraged, permitted, or exploited students to protest his dismissal, to walk out of their classrooms, or to otherwise demonstrate in his behalf.

Slick stated by affidavit that the statement was issued "because members of the ECEA were concerned that McIntosh was using the media to criticize high school teachers, rally students, and community his cause, and to intimidate the Board and influence the Board's decisions regarding his employment rather than following proper procedures to challenge his termination as set forth by Ohio law." During her deposition, Slick testified that the ECEA voted to allow Griffith to make a statement urging the Board "to follow the process of supporting a supervisor's recommendation." In a memo to her supervisor, Slick admitted that "[t]he position of the Association is not that the board should or should not have nonrenewed/terminated

Mr. McIntosh. Rather, the Association is supporting the Board of Education in that they 'followed the process.' " Slick drafted the statement, however, "based on the authority that I know a president of an elected Association has."

McIntosh stated by affidavit that he had been quoted by the Canton Repository as saying that, if there were disciplinary problems at the high school, they were the result of "weaker faculty members." He stated that he had made written criticisms of teachers regarding discipline and those criticisms were in the teachers' personnel files. Regarding press coverage, McIntosh stated that reporters came to his house to interview him and that, "They certainly weren't invited." He denied taking part in any community activity protesting his termination. He stated that he was not responsible for students walking out of school, students carrying banners or signs, or anything else disruptive of the educational process. He added that he "was long gone when that happened."

Kathy Poporad, a guidance counselor at the school and a member of the ECEA who had attended the March 10 meeting, stated that Slick had informed ECEA members that they should show "mass support for the School Board." Poporad stated that she was not aware at the time of the meeting that the Superintendent sought to terminate McIntosh's contract as principal and that the ECEA had voted only to authorize a "statement supporting the nonrenewal process." According to Poporad, ECEA members never authorized a statement to be read on behalf of the members supporting the Superintendent's recommendation that McIntosh's contract be "nonrenewed, terminated, or

suspended, and never authorized a statement urging the School Board to support the Superintendent's recommendation." Poporad also stated that the members had not authorized a statement regarding McIntosh blaming "weak teachers" for disciplinary problems or stating that the teachers could not work with McIntosh again. Poporad also stated that, at a March 20, 1995, ECEA meeting, Slick said that McIntosh would return to the high school "only if hell were to freeze over" and that it "was sad that McIntosh had all these due process rights."

The affidavit of another ECEA member, high school teacher Julie Conrad, echoed many of Poporad's statements.

McGuire stated that a teacher had informed him that students were making posters and signs in the school supporting McIntosh. A parent also had called McGuire to state that she had "taped a conversation of one student talking to another to organize some disruption at the school." McGuire did not know whether McIntosh was aware of the posters and the planned disruption, but he believed McIntosh should have taken "steps to not allow them to happen." McGuire also stated that he did not believe McIntosh was immoral, although he had used that term in his notice to McIntosh.

On August 22, 1996, the trial court granted summary judgment to ECEA, Slick, Griffith, and OEA, finding that: (1) the trial court was without jurisdiction to hear the charge that ECEA had breached its duty to represent him; (2) Slick and Griffith were not personally liable for their activities on behalf of the ECEA and OEA; (3) McIntosh had not proved

defamation on the part of Slick, Griffith, OEA, or ECEA and specifically had not shown, as is required of a "public figure," that they acted with actual malice in making statements against him; and (4) McIntosh had not demonstrated tortious interference with contract because ECEA and its representatives were justified in making the statements they did about McIntosh.

McIntosh appeals the second through the fourth findings of the trial court, and asserts three assignments of error.[4]

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4. McIntosh's notice of appeal, filed on September 20, 1996, stated that he was appealing the court's August 22, 1996, order. That decision did not address ECEA's complaint for declaratory judgment, nor did it contain the "no just reason for delay" language required by Civ.R. 54(B). As a result, the August 22 order was not a final appealable order.

On September 25, 1996, the trial court ordered that *East Canton Ed. Assoc. v. McIntosh*, Stark C.P. No. 1995-CV-02208-1, the case that commenced with ECEA's declaratory judgment action, be consolidated with *State ex rel. John R. McIntosh v. Osnaburg Local School Dist. Bd. of Edn.*, Stark C.P. No. 1995CV00475. A final order in the consolidated cases was rendered on January 23, 1997. App.R. 4(C) permits this court to treat McIntosh's premature notice of appeal as if it was filed immediately after the final order, thereby conferring jurisdiction on this court to hear this appeal. See *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 71, fn. 1.

*Appendix C*

## ASSIGNMENT OF ERROR NO. 1

**THE TRIAL COURT ERRED IN SUMMARILY DISMISSING APPELLANT'S DEFAMATION ACTION.**

In his first assignment of error, Appellant argues that the trial court erred in granting summary judgment to the Appellees because: (1) as a high school principal, he was not a public figure; and (2) there were material issues of fact as to whether he had established a prima facie case of defamation.

A.

In reviewing a trial court's ruling on a summary judgment motion, an appellate court applies the same standard used by the trial court. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829. Pursuant to Civ.R. 56(C), summary judgment is proper if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. It must appear from the evidence that reasonable minds can come to only one conclusion and, viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Id.* The burden of establishing the appropriateness of summary judgment is on the moving party. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. Doubts must be resolved in favor of the nonmoving party. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686.

Since only legal questions exist, no special deference is to be afforded the trial court upon a review of an entry of summary judgment. *Lorain Cty. Bd. of Commrs. v. United States Fire Ins. Co.* (1992), 81 Ohio App.3d 263, 267. We, therefore, review the matter *de novo*. *Pennsylvania Lumbermens Ins. Corp. v. Landmark Elec., Inc.* (1996), 110 Ohio App.3d 732, 743; *Tyler v. Kelley* (1994), 98 Ohio App.3d 444, 446.

In order to determine whether issues of material fact remained to be determined, thereby precluding summary judgment, the applicable substantive law must be examined. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 91 L.Ed.2d 202, 211.

B.

The passages alleged to be defamatory were part of the statement written by Slick and delivered by Griffith at the March 13, 1995, Board meeting, which was attended by several hundred residents of the District:

> [1.] I am here tonight specifically authorized by our membership to address you on their behalf and to express their views on the recent events in our district.
>
> [2.] **Let there be no doubt, the ECEA supports the recommendation of the Superintendent and urges this Board to do the same.**
>
> [3.] When discussing the Board's charge that he had problems with disciplining students,

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> [McIntosh] was quoted in the newspaper as blaming "weak teachers."
>
> [4.] I have personally reviewed every evaluation of each high school teacher. There is not one criticism of any of the teachers, by Mr. McIntosh or any other evaluator, regarding student discipline.
>
> [5.] **How could this Board or community ever expect our staff to work for Mr. McIntosh as their supervisor or even with him as a fellow teacher after such a self-serving attack?**
>
> [6.] It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district.

(Emphasis *sic.*)

In their motion for summary judgment, Appellees argued that McIntosh had failed to demonstrate on the record that the alleged defamatory statements of Appellees were made with actual malice. The trial court, in ruling for Appellees, found that the actual malice standard did indeed apply because McIntosh was a "public figure." The court also found that: (1) passage 2, "Let there be no doubt * * *," was mere opinion and did not subject McIntosh to public hatred, contempt, ridicule, shame, or disgrace; (2) passage 6, "It is just plain wrong * * *," was susceptible of two meanings, one defamatory and one innocent, and that the court was

required to adopt the innocent meaning; and (3) the remaining passages were either opinion or did not tend to subject McIntosh to contempt, ridicule, shame, or disgrace.

McIntosh asserts in his first assignment of error that the six passages at issue were false because: (1) ECEA members did not authorize Griffith to make those specific statements on its behalf; (2) ECEA members did not support the recommendation of the superintendent to fire McIntosh nor did they authorize Griffith to urge the Board support the recommendation of McGuire; (3) McIntosh blamed "weaker faculty members" and not "weak teachers" for disciplinary problems; (4) there are evaluations of some high school teachers on file at the school, wherein McIntosh criticized them for poor discipline; (5) ECEA did not decide that it could not work for McIntosh as its supervisor or fellow teacher; and (6) McIntosh did not exploit students and allow the community to be torn apart.

C.

Defamation is a false publication that injures a person's reputation. *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112, 117. A cause of action for defamation consists of four elements: (1) a false and defamatory statement about plaintiff; (2) published without privilege to a third party, (3) with fault of at least negligence on the part of the defendant, and (4) that was either defamatory *per se* or caused special harm to the plaintiff. See *Akron-Canton Waste Oil, Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601, citing Restatement of the Law 2d, Torts (1977) 155, Section 558. A court must decide as a

matter of law whether certain statements alleged to be defamatory are actionable. *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 372. In cases raising First Amendment issues, "an appellate court has an obligation to 'make an independent examination of the whole record in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States, Inc.* (1984), 466 U.S. 485, 499, 80 L.Ed.2d 502, 515; *Stow v. Colville* (1994), 96 Ohio App.3d 70, 74.

As a preliminary matter, we address the trial court's finding that passages 1 through 5 were constitutionally protected opinion. While Ohio continues to recognize a distinction between statements of fact and opinion for defamation purposes, opinions are afforded no additional protection under the United States Constitution. In *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 18-21, 111 L.Ed.2d 1, 17-19, the United States Supreme Court abandoned long-held distinctions between statements of fact and opinion and held that there was no separate constitutional privilege for opinion. The underlying reasoning for the Court's decision is that "expressions of 'opinion' may often imply an assertion of objective fact." *Id.*, 497 U.S. at 18, 111 L.Ed.2d at 17. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications[.]" *Id.*, 497 U.S. at 18-19, 111 L.Ed.2d at 18. Accordingly, statements of opinion must be reviewed under the United States Constitution in the same manner as other

statements for a determination as to whether they include false assertions as to factual matters. *Masson v. New Yorker Magazine, Inc.* (1991), 501 U.S. 496, 516, 115 L.Ed.2d 447, 472.

Despite *Milkovich,* the Ohio Supreme Court has ruled that the Ohio Constitution provides a separate and independent guarantee of protection for opinions. *Vail v. The Plain Dealer Pub. Co.,* (1995), 72 Ohio St.3d 279, 281, certiorari denied (1996), __ U.S. __, 133 L.Ed.2d 657.

> When determining whether speech is protected opinion a court must consider the totality of the circumstances. Specifically, a court should consider: the specific language at issue, whether the statement is verifiable, the general context of the statement, and the broader context in which the statement appeared. (*Scott v. News Herald* [1986], 25 Ohio St.3d 243, 496 N.E.2d, approved and followed; Section 11, Article I of the Ohio Constitution, applied.)

*Vail*, at the syllabus.

1.

The first element to be demonstrated in a defamation action is that the statement at issue is false *and* defamatory and is made about the plaintiff. The burden is on the plaintiff in a defamation action to prove that the alleged defamatory matter is false. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. at 517, 115 L.Ed.2d at 472. "Minor inaccuracies do not

amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " *Id.*, quoting *Heuer v. Kee* (1936), 15 Cal.App.2d 710, 714, 59 P.2d 1063, 1064. A statement is not considered false unless it would produce a different effect on the recipient from that which the truth would have produced. *Masson*, 501 U.S. at 517, 115 L.Ed.2d at 472.

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." 3 Restatement of the Law 2d, Torts (1977) 156, Section 559. A communication may be defamatory because it exposes another to hatred, ridicule, or contempt. *Id.* at Comment b. However, a communication may also be defamatory if it "tend[s] to disparage another by reflecting unfavorably upon his personal morality or integrity[.]" *Id.*

A defamatory communication may consist of a statement of fact or an expression of opinion. *Id.* at 170, Sections 565-566. In order to constitute a defamatory statement of fact, "[i]t is enough that the communication is reasonably capable of being understood as charging something defamatory." *Id.* at 170, Section 565, Comment b. While a court determines as a matter of law whether a statement is capable of bearing a defamatory meaning, a jury or other fact finder determines whether such a statement was understood by its recipient to be defamatory. *Id.* at 311, Section 614.

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We review each of the passages at issue, then, to determine whether it is false *and* capable of charging something defamatory.

*Passage 1*

> "I am here tonight specifically authorized by our membership to address you on their behalf and to express their views on the recent events in our district."

There is no issue of material fact in the record as to whether ECEA authorized a statement. In her deposition in support of Appellant, Poporad stated that Slick addressed the ECEA on March 10 and explained the importance of ECEA issuing a statement supporting "the statutory 'process' of 'nonrenewing a principal's contract.' " ECEA "voted only to authorize a statement supporting the nonrenewal process" Because ECEA did, in fact, authorize a statement and because passage 1 is general enough to fall within the scope of that authority, passage 1 is not false and does not satisfy the first element of a defamation action. The grant of summary judgment to Appellees on passage 1 was proper.

*Passage 2*

> "Let there be no doubt, the ECEA supports the recommendation of the Superintendent and urges this Board to do the same."

Poporad testified that the ECEA authorization was limited to a statement about the renewal process. She was

not aware that the Superintendent sought to terminate McIntosh's contract. According to Poporad, "[t]he ECEA members never authorized a statement urging the School Board to support the Superintendent's recommendation [and t]he ECEA never voted on whether Mr. McIntosh should be nonrenewed, suspended or terminated." Even Griffith acknowledged that the authorization was limited to the "process," and Slick admitted to her supervisor that ECEA supported the Board only insofar as they "followed the process." McIntosh is entitled to argue that the passage should be analyzed as if Griffith had reported falsely that ECEA had given a negative assessment of McIntosh's performance. See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. at 522, 115 L.Ed.2d at 476. A reasonable jury could find a material difference between the meaning of passage 2 and the statement that was authorized by ECEA members.

We also find that passage 2 is capable of a defamatory meaning because it states that "the ECEA supports the recommendation of the Superintendent," which was that McIntosh "be suspended and/or terminated for gross inefficiency, immorality * * *." Passage 2 conveys the message that ECEA members believed that McIntosh should be terminated because he was deficient in performing the duties of principal. Passage 2, if believed, harmed McIntosh's reputation, deterred the District from continuing to employ him, and reflected unfavorably upon his personal morality.

As to whether passage 2 is to be afforded protection as an opinion under the Ohio Constitution, we apply the test set forth in *Vail v. The Plain Dealer Pub. Co.*, 72 Ohio St.3d 279, syllabus. There is nothing in the language of the passage

to suggest that it is an opinion. The statement unequivocally states that "the ECEA supports the recommendation of the Superintendent." The general context of the statement establishes that its purpose is to communicate the views of the ECEA to the Board, not to communicate the personal opinions of Slick and Griffith. The context here is very different than that found to be protected in *Vail* where the alleged defamatory statements appeared in a newspaper column labeled "Commentary." *Id. at 282.* Here, the statements were delivered at a public meeting and communicated the decision of the ECEA membership. Moreover, whether ECEA supports the Superintendent's recommendation and whether it urges the Board to do the same are wholly verifiable under the *Vail* test. Accordingly, passage 2 is afforded no special protection under the Ohio Constitution.

It was error for the trial court to grant summary judgment to Appellees on passage 2.

*Passage 3*

> "When discussing the Board's charge that he had problems with disciplining students, [Appellant] was quoted in the newspaper as blaming "weak teachers."

The Canton Repository actually quoted McIntosh as saying, "Discipline begins in the classroom[;] * * * [t]he primary problem has been some of the weaker faculty members, and I've put heat on them." McIntosh does not dispute that he made the statement as reported. His position

is that "faculty members" implies non-teaching personnel as well as teachers; thus, passage 3 is false. We find the distinction to be immaterial and conclude that passage 3 is not false. The grant of summary judgment to Appellees on passage 3 was proper.

*Passage 4*

> "I have personally reviewed every evaluation of each high school teacher. There is not one criticism of any of the teachers, by Mr. McIntosh or any other evaluation, regarding student discipline."

According to McIntosh's affidavit, he "made written criticisms of teachers regarding discipline, which criticisms are contained in those teachers' personnel files located in the East Canton High School." Griffith and Slick stated in their depositions that they reviewed those files and found none that were critical of any teacher's disciplinary efforts. Because there is an issue of material fact as to whether passage 4 was false, summary judgment should not have been granted to Appellees on this statement. Moreover, passage 4 is afforded no special protection as an opinion under the Ohio Constitution because its contents are verifiable statements of fact and nothing about its context or language suggests that it is merely opinion.

It was error for the trial court to grant summary judgment to Appellees on passage 4.

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*Passage 5*

> "How could this Board or community ever expect our staff to work for Mr. McIntosh as their supervisor or even with him as a fellow teacher after such a self-serving attack?"

This question flows from passage 3 regarding McIntosh's alleged criticisms of some "teachers" or "faculty."

Questions may be as actionable a defamatory statements. See *Schoedler v. Motometer Gauge & Equip. Corp.* (1938), 134 Ohio State 78, 83-84. However, as we noted in our discussion of passage 3, we find the distinction between "weak teachers" and "weak faculty members" to be immaterial. Thus, to the extent passage 5 is premised on passage 3, this passage is not false.

The portion of passage 5 that characterizes McIntosh's statement as a "self-serving attack" connotes nothing defamatory and is protected opinion under the *Vail* test. The characterization is not a verifiable fact; the language used is consistent with that used to convey an opinion; and its context, within the question posed, suggests an opinion.

Accordingly, summary judgment on passage 5 was proper.

*Passage 6*

> "It is just plain wrong for one person to exploit students and to allow a community to be torn apart

> with the circus-like atmosphere that has existed in this district."

Passage 6 implies that McIntosh exploited students. Appellees produced no evidence that McIntosh exploited students. McIntosh, on the other hand, denied that he exploited students, testified that he had been banned from the school premises by the time the students demonstrated on his behalf, and testified that he was not responsible for any of the student demonstrations undertaken on his behalf. Accordingly, a reasonable jury could conclude that passage 6 is false and defamatory.

As to whether passage 6 constitutes protected opinion under the Ohio Constitution, while the "just plain wrong" language connotes the speaker's opinion, the remainder of the passage suggests that McIntosh exploited students and contributed to the "circus-like" atmosphere of the community. The basis for the opinion part of the statement, then, is based upon verifiable facts that suggest wrongdoing on McIntosh's part. Accordingly, passage 6 is not protected opinion under the Ohio constitution.

Summary judgment should not have been granted to Appellees on passage 6.

2.

The second element of a defamation action is that the statement be made without privilege:

> "A qualified or conditionally privileged communication is one made in good faith on any

> subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. *The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.*"

(Emphasis *sic.*) *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244, quoting 50 American Jurisprudence 2d 698, Libel and Slander, Section 195. An occasion may make a publication conditionally privileged "if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true." 3 Restatement of the Law 2d, Torts (1965) 281, Section 598. Although the circumstances may create the privilege, a person cannot avail himself of the privilege if he abuses it. *Id.*, at Comment a.

Slick stated in her deposition that she believed that Griffith, as president of ECEA, had broad authority to speak for the association and that there were no restrictions in what Griffith could say in her statement to the Board. Slick also stated, however, that "[t]he position of the Association is not that the board should or should not have nonrenewed/

terminated Mr. McIntosh. Rather, the Association is supporting the Board of Education in that they "followed the process.' " Even Griffith, agreeing with witnesses for McIntosh, stated that the ECEA voted to support the process, not to support the Superintendent's recommendation to terminate McIntosh.

Viewing the record before us in a light most favorable to McIntosh, there is at a minimum an issue of material fact as to whether Griffith and Slick exceeded their authority by publicizing passages 2 and 6 and thus abused the privilege. Since a party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on each essential element of the nonmoving party's claims, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293-294, the trial court should not have granted summary judgment to Appellees with respect to passages 2 and 6 because questions remain as to whether the passages were privileged. Similarly, if passage 4 proves to be untrue, there is no privilege applicable.

3.

The third element a plaintiff must establish in a defamation claim is that the defendant made the false and defamatory statements about him at least negligently. The trial court in the case before us found McIntosh to be a public figure and held him to the higher degree of proof required of public figures.

In *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280, 11 L.Ed.2d 686, 706, the United States Supreme

Court held that a public official may not recover damages for a defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." In *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 163-164, 18 L.Ed.2d 1094, 1116, the Court extended the *New York Times* rule to apply to public figures as well as public officials.

In *Gertz v. Welch* (1974), 418 U.S. 323, 332, 41 L.Ed.2d 789, 801, the Court considered whether the *New York Times* rule should be further extended to actions against "a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure." The Court held that the *New York Times* rule did not extend to defamation actions by private individuals who happened to have been involved in public issues. *Id.*, 418 U.S. at 343, 41 L.Ed.2d at 807.

The Ohio Supreme Court has not considered the issue of whether a school principal is a public figure. However, a recent group of cases provides some guidance.

In *Milkovich v. News-Herald* (1984), 15 Ohio St.3d 292, reversed on other grounds (1990), 497 U.S. 1, 111 L.Ed.2d 1, the court determined that a high school wrestling coach was not a public figure or public official for purposes of defamation law. *Id.* at 297. The court defined "public figure" as "one who commanded a substantial amount of public interest by his status alone, or one who had thrust himself by purposeful activity into the vortex of an important public controversy." *Id.* at 294, citing *Curtis Publishing Co. v. Butts, supra.*

> "For the most part those who attain this status [as a public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

*Id.* at 295, quoting *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, 345, 41 L.Ed.2d 789, 808. Using the foregoing analysis, the court concluded that a wrestling coach is not a public figure because he does not occupy a position of persuasive power and influence and his position did not put him at the forefront of public controversies, allowing him to exert influence over the resolution of those controversies. *Milkovich*, 15 Ohio St.3d at 297. The coach's involvement in one controversy concerning a wrestling match at another school did not raise him to the status of a public figure where he did not "thrust himself to the forefront of that controversy in order to influence its decision." *Id.*

In *Scott v. News-Herald* (1986) 25 Ohio St.3d 243, 247-248, the Ohio Supreme Court considered the status of the school superintendent involved in the same controversy as wrestling coach Milkovich and overruled *Milkovich* "in its restrictive view of public officials," holding that a public school superintendent is a public official for purposes of defamation law.

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> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, * * * the *New York Times* malice standards apply."

*Scott*, 25 Ohio St.3d at 245, quoting *Rosenblatt v. Baer* (1966), 383 U.S. 75, 86, 15 L.Ed.2d 597, 606. The *Scott* court concluded that a superintendent of a public school system, as the executive officer for the school board, had substantial responsibilities in the operation of the system and that the public had a substantial interest in the qualifications and performance of the person appointed as superintendent. *Id.* at 246.

In *Milkovich v. Lorain Journal Co.* (1990), 497 U.S. 1, 10, 111 L.Ed.2d 1, 12, fn.5, the United States Supreme Court determined that the Ohio Supreme Court's overruling of *Milkovich*'s restrictive view of public officials was "pure dicta." The Court noted that since Milkovich was not a party to the proceedings in *Scott,* and since the public-private figure question had never been reconsidered in any of Milkovich's proceedings following *Milkovich v. News Herald*, 15 Ohio St.3d 292, the Ohio Supreme Court's 1984 decision continued to be the law of the case regarding Milkovich. *Id.* Accordingly, the United States Supreme Court reviewed the *Milkovich* decision before it on the basis that the wrestling coach was a private figure.

In view of the foregoing, we find that McIntosh was neither a public official nor a public figure. As a high school

principal, McIntosh did not assume a role of special prominence in the affairs of society. He did not occupy a position of such persuasive power and influence that he can be deemed a public figure for all purposes as required by *Gertz*. Nor did he thrust himself to the forefront of the public controversy that may have developed concerning his termination. According to the record before us, McIntosh left the high school on March 9, 1995, when ordered to do so by the Superintendent and armed police officers. There is no evidence linking McIntosh to the actions of the students and parents who protested his termination. Nor is there any evidence that McIntosh sought out the media to trumpet his cause. Accordingly, the trial court erred in finding that McIntosh was a public figure and requiring that he be held to the *New York Times* standard of proving actual malice.

A private plaintiff in a defamation case must only show that the alleged defamatory statement was false and that the defendant was at least negligent in publishing it. *Dale v. Ohio Civ. Serv. Emp. Assn.* (1991), 57 Ohio St.3d 112, 114, certiorari denied, 501 U.S. 1231, 115 L.Ed.2d 1021; *Gosden v. Louis* (Dec. 4, 1996), Summit App. No. 17609, unreported, at 18. Since we have already determined that passages 2, 6, and possibly 4 of the statement were false and defamatory, in order to be granted summary judgment Appellees were required to point to evidence in the record demonstrating that there was no issue of material fact regarding whether they were negligent in publishing those passages. In view of the substantial evidence before the trial court that the statements were not authorized by the ECEA, including Griffith's own statement to that effect, summary judgment should not have been granted with respect to passages 2, 6, and 4.

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4.

Because the trial court found that the statements at issue were not defamatory and were not made with actual malice, it did not reach the fourth element of a defamation action: namely, a determination of whether the statements were either defamatory *per se* or caused special harm to McIntosh.

There was substantial evidence in the record that McIntosh, following his removal as high school principal, applied to numerous schools for both administrative and teaching positions and was not even interviewed by any of those schools. Appellees identified nothing in the record to demonstrate that McIntosh could not establish harm and thus failed to meet their burden, as movants for summary judgment, regarding this element.

D.

With respect to passages 2, 4, and 6, McIntosh's first assignment of error is sustained. With respect to passages 1, 3, and 5, McIntosh's first assignment of error is overruled.

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## ASSIGNMENT OF ERROR NO. 2

**THE TRIAL COURT ERRED IN SUMMARILY DETERMINING THAT THIRD-PARTY (sic) DEFENDANTS/APPELLEES MARY JO SLICK AND SHARON GRIFFITH COULD NOT BE HELD INDIVIDUALLY LIABLE FOR THE FALSE STATEMENTS THEY CAUSED TO BE PUBLISHED.**

The trial court ruled as a matter of law that neither Griffith nor Slick were individually liable for defamation or for interference with employment. The court found that under Ohio law and under the Labor Management Relations Act, agents of a union are not individually liable for actions done in furtherance of their union activities.

In his second assignment of error, McIntosh argues that summary judgment was improper where there remained a genuine issue of material fact as to whether Slick and Griffith were acting in furtherance of their union activities, or for personal reasons, when they made the statements at issue.

Slick and Griffith rely on R.C. 1745.02 which provides that "[a] money judgment against [an] unincorporated association shall be enforced only against the association as an entity and shall not be enforceable against the property of an individual member of such association." While this statute provides protection to members of unincorporated associations such as OEA and ECEA for money judgments against their associations, the question remains whether a judgment rendered for McIntosh would be against ECEA

and OEA alone, or whether Slick and Griffith can be held individually liable. R.C. Chapter 1745 was enacted to provide a basis for suit against an unincorporated association "*cumulative to that for suing the individual members of the association.*" (Emphasis added.) *Miazga v. Internatl. Union of Operating Engineers* (1965), 2 Ohio St.2d 49, 53.

Appellees also rely on *Complete Auto Transit, Inc. v. Reis* (1981), 451 U.S. 401, 68 L.Ed.2d 248, and *Sellers v. Doe* (1994), 99 Ohio App.3d 249, for the proposition that individual immunity is afforded to union members and representatives regardless of whether they are performing acts authorized by the union or *unauthorized* acts. We do not agree.

*Complete Auto Transit* was limited to a consideration of Section 301 of the Labor Management Relations Act, which provides that money judgments against a union for violation of collective bargaining agreements are not enforceable against any individual member. The case involved a strike not authorized by the union and efforts by the employer to hold individual union members liable for losses sustained as the result of the strike. After considering the legislative history of the Act, the Court's narrow holding was that "Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by the union to strike." *Complete Auto Transit, Inc. v. Reis*, 451 U.S. at 415, 68 L.Ed.2d at 260.

*Sellers v. Doe* involved a legal malpractice action brought by a teacher against attorneys who had been provided to him by the OEA to represent him in termination

proceedings. The *Sellers* court relied on *Peterson v. Kennedy* (C.A.9, 1985), 771 F.2d 1244, 1258, which held that union attorneys "who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants where the services the attorneys perform constitute a part of the collective bargaining process." *Sellers* extended the immunity to outside counsel where counsel is hired and paid by the union to act for it. *Sellers v. Doe*, 99 Ohio App.3d at 252.

Each of these cases relied on by Appellees presumes that the union employee or agent was acting within the scope of his employment for the union at the time of the alleged injury. The record in the case before us provides conflicting testimony as to whether Griffith and Slick were acting within the scope of their employment when they prepared and delivered a statement beyond that which was authorized by the members.

Resolution of this issue is closely aligned with the question of whether each passage in the statement delivered by Griffith was conditionally privileged. "The privilege may be abused and its protection lost by the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter * * * [or] by the publication of the defamatory matter for some improper purpose * * * [or] by excessive publication * * * or by the publication of defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged." 3 Restatement of the Law 2d, Torts (1977) 281, Section 598, Comment a. "The effect of abuse of a conditional privilege is to make the publisher of the

defamation subject to liability for the abuse." *Id.* at 286, Section 599, Comment b.

On the record before this court, a reasonable trier of fact could conclude that Griffith and Slick were acting outside the scope of their employment when they prepared and delivered the statement. Accordingly, summary judgment for them on the issue of personal liability was improper.

McIntosh's second assignment of error is sustained.

**ASSIGNMENT OF ERROR NO. 3**

**THE TRIAL COURT ERRED IN SUMMARILY DISMISSING APPELLANT'S CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH HIS EMPLOYMENT CONTRACTS.**

In their motion for summary judgment, Appellees argued that: (1) McIntosh's complaint failed to address all of the elements of a claim for tortious interference with employment contract; (2) McIntosh failed to establish the existence of a contract; (3) McIntosh could not prove that Appellees procured the breach of the purported contract; (4) Appellees actions were justified; and (5) McIntosh has been paid as a teacher during the dispute and, thus, can show no harm. Appellees' motion addressed only McIntosh's "purported" continuing contract as a teacher, which was part of the issue to be resolved in ECEA's original complaint for declaratory judgment.

McIntosh opposed Appellees' motion for summary judgment, pointing out that his complaint for interference

with employment contract was pleaded with respect to *two* contracts: his contract as a principal and his separate contract as a tenured teacher. Appellees filed a "reply brief," this time addressing McIntosh's contract as principal and alleging that: (1) McIntosh had admitted in his deposition (a) that none of the Appellees were parties to his contract as principal and (b) that they had no standing to award or deny him a Principal's contract; and that (2) the Board had acted lawfully in terminating his contract.

In granting summary judgment to Appellees on the tortious interference claims, the trial court addressed only McIntosh's contract as a teacher. The court noted that the parties disputed whether a teaching contract existed, but found that ECEA had knowledge at least of McIntosh's "claim of contract." The court ruled, however, that McIntosh had provided "no evidence to support the claim that [ECEA] did not have justification to make such statements."

In order to recover for a claim of intentional interference with employment contract, one must prove: (1) the existence of an employment contract; (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of the contract's breach, (4) lack of privilege or justification, and (5) resulting damage. See *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, paragraph two of the syllabus.

In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293-94, the Supreme Court of Ohio, citing its previous decision in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 114-115, outlined the respective burdens upon the moving and

nonmoving parties in the context of a Civ.R. 56 motion for summary judgment:

> [A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some *evidence* of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

In order to be granted summary judgment, Appellees were required to identify those portions of the record that demonstrated the absence of a genuine issue of material fact

on McIntosh's claim for tortious interference with each of his employment contracts. Instead, with respect to McIntosh's teacher's contract, Appellees admitted that "whether a continuing contract *actually exists*" was the essence of ECEA's complaint for declaratory judgment. (Emphasis *sic.*) Appellees pointed only to a joint stipulation in which McIntosh admitted having no recollection of the contract being "physically issued" to him although the school board in question had voted to grant him a continuing contract of employment.

Appellees failed to address in their motion the second element of a tortious interference claim; and, with respect to the third element, Appellees merely alleged that McIntosh could not show any act "that caused his purported contract to be breached." Regarding the fourth element, they alleged that their conduct was privileged or justified and pointed only to a joint stipulation that stated that ECEA was the collective bargaining representative for teaching employees.

Finally, with respect to the element of damages, Appellees claimed that McIntosh was being paid as a teacher but provided nothing in the record to support this allegation.[5]

Because Appellees failed to meet their burden as set forth in *Dresher v. Burt*, *supra*, the trial court erred in granting summary judgment on the claim of interference with

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5. Appellees stated by footnote that McIntosh has been paid as a teacher pursuant to a court order issued in the unreported case of *State ex rel. McIntosh v. Osnaburg Local School Dist. Bd. of Ed.*, Stark C.P. No. 95-CV-00475. The footnote states that that decision has been appealed.

McIntosh's teaching contract. The burden of proof did not shift to McIntosh to establish each of the elements of his claim. *Id.*

With respect to the claim of interference with his contract as principal, Appellees pointed only to McIntosh's deposition testimony in which he stated that none of the Appellees were a party to his contract with the board and did not have "standing" to award or deny him a principal's contract.

None of the elements of a tortious interference claim requires that a defendant be a party to the contract at issue. It is enough that the party "intentionally procure" the breach. Since Appellees addressed none of the elements of McIntosh's claim for tortious interference with his contract as principal, the trial court erred in granting summary judgment "as to all claims of tortious interference with contract." McIntosh's third assignment of error is sustained.

The decision of the trial court is affirmed in part and reversed in part; and this cause is remanded for further proceedings consistent with this opinion.

*Judgment affirmed in part,*
*reversed in part,*
*and caused remanded.*

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Stark Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to all parties equally.

Exceptions.

s/ William R. Baird
WILLIAM R. BAIRD
FOR THE COURT

DICKINSON, P. J.
CONCURS

SLABY, J.
CONCURS IN JUDGMENT ONLY

(Dickinson, J.; Baird, J.; and Slaby, J.; Judges of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution.)

* * *

## APPENDIX D — JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS, STARK COUNTY, OHIO DATED AND FILED JANUARY 23, 1997

**IN THE COURT OF COMMON PLEAS**
**STARK COUNTY, OHIO**

**CASE NO. 1995CV00475**

**JUDGE JOHN F. BOGGINS**

**STATE OF OHIO, EX REL.**
**JOHN R. MCINTOSH, et al.**

**Plaintiffs,**

**vs.**

**OSNABURG LOCAL SCHOOL DISTRICT**
**BOARD OF EDUCATION, et al.,**

**Defendants.**

### JUDGMENT ENTRY

This cause came on to be heard on Defendants' Motion for Summary Judgment filed December 9, 1996, Plaintiffs' Memorandum Contra, filed January 16, 1997, and Plaintiffs' Motion for Summary Judgment, filed January 16, 1997.

Upon review of the motions, briefs in support and the file in this matter, and in accordance with Civil Rule 56, the Court finds the following:

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The issues remaining in Case No. 1995CV00475 which are the subject of Defendants' Motion for Summary Judgment are contained in Count III (Breach of Contract), Count VI (Defamation), and Count VII (Tortious Interference with Employment Contract).

Civil Rule 56 establishes standards as to materials to be considered and how the Court is to review such material.

Civil Rule 56 provides in part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

In considering these matters, the Court has explicitly followed such Rule.

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Further, under the directive of *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St.3d 108, the Court finds that the nonmoving party is required to produce evidence on any issue for which that party bears the burden of production at trial. *Celotex v. Catrett* (1986), 477 U.S. 317.

**COUNT III (BREACH OF CONTRACT)**

*Principal's Contract*

The Court finds that the Court of Appeals for the Fifth District with the Judges of the Ninth District sitting, have determined that the Board of Education of Osnaburg Local acted properly in non-renewing the administrative contract of the Plaintiff. Therefore, the Court determines that no breach of contract occurred with respect to said Principal's Contract.

*Teachers Contract*

The Court finds that this contract is the issue submitted before this Court on an Amended Agreed Stipulation of Facts filed under *East Canton Education Association v. McIntosh*, Case No. 1995CV02208. The Court has issued a separate ruling with regard to this matter which is being filed contemporaneously with this Entry.

However, there was no breach of an existing teacher's contract and therefore, Defendants' Motion is sustained as to Count III.

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## COUNT VII
## (TORTIOUS INTERFERENCE WITH EMPLOYMENT CONTRACT)

As to Count VII, the Court finds no basis for the allegations in regard to this Count. Tortious Interference with an Employment Contract requires interference by a *third party*. In the case at bar, the School Board, and/or its members, are parties to any employment contract, not third parties. The Court therefore sustains Defendants' Motion as to this Count also.

## COUNT VI (DEFAMATION)

To prevail on a cause of action for defamation, Plaintiffs must prove that there occurred a publication to a third person for which the Defendant is responsible, the recipient's understanding of the defamatory meaning, and its actionable character." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 243.

*Public figure v. Private Citizen*: The Court must first determine Plaintiff's classification as either a private citizen or a public figure. The Court determines that the Plaintiff, John McIntosh, is a public figure.

*Burden*: As a public figure, Plaintiff has the burden of proving, by clear and convincing evidence, that the defamatory statement was made with "actual malice". *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280. Plaintiff must show that the Defendants made such statement with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*

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*Publication*: The Court finds that Plaintiff has failed to produce competent evidence that Defendants published any defamatory statements. The Court finds that any publication which occurred was done by the Plaintiff himself. The Court finds no support for plaintiff's position that a publication occurred when Defendant McGuire gave the March 10th letter to his secretary to type as claimed by plaintiff.

The Court does find that Plaintiff is the one who demanded that all the termination/non-renewal proceedings be done in public, rather than in executive session, which otherwise would have remained confidential. The Court also finds that Plaintiff was the one who published said letter by showing same to others, including members of the press.

With regard to the "Open Letter" sent to the community, the Court finds that the statements therein consist of either expressions of opinion by the members of the Board or do not tend to subject Plaintiff to contempt, ridicule, shame or disgrace.

*Privilege*: The Court also finds that Defendants are entitled to an absolute privilege. The law recognizes an absolute privilege for statements made by public officials in proceedings before a board or other administrative bodies. See *Bigelow v. Brumley* (1941), 138 Ohio St. 574. This Court joins with other state courts in applying the same to school officials for statements made in board meetings or other barred proceedings. (See Defendants' Brief P. 25). The Court finds that the proceedings of the Board of Education in this case were quasi-judicial in nature and that such statements made at such proceedings, *Sorin v. Bd. Of Education* (1974),

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39 Ohio Misc. 108, as related to matters under consideration, are subject to absolute privilege. See *Costanzo v. Gaul* (1980), 62 Ohio St.2d 106.

For the above reasons, the Court sustains Defendants' Motion for Summary Judgment on Counts III and VII and Count VI. Plaintiffs' Complaint is hereby dismissed. Costs taxed to Plaintiff.

IT IS SO ORDERED.

s/ John F. Boggins
Judge John F. Boggins

## APPENDIX E — JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS, STARK COUNTY, OHIO DATED AND FILED JANUARY 23, 1997

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

Case No. 1995cv00475
Case No. 1995cv02208

JUDGE JOHN F. BOGGINS

STATE OF OHIO, EX REL.
JOHN R. MCINTOSH, ET AL.

Plaintiffs,

vs.

OSNABURG LOCAL SCHOOL DISTRICT,
BOARD OF EDUCATION, ET AL.

Defendants.

JUDGMENT ENTRY

This Judgment Entry relates to those matters contained within the pleadings in Case No. 1995cv02208-1 which has been consolidated with Case No. 1995cv00475.

These portions of Case No. 1995cv02208-1 which are not presently on appeal have been submitted by the respective parties on an amended agreed stipulation of facts and such are incorporated by reference herein.

*Appendix E*

The Complaint of the East Canton Education Association is in the alternative and requests a Court determination essentially in three areas.

The first proposition of the Complaint requires the Court to determine if John McIntosh possessed a continuing teaching contract, normally referred to as tenure, while in the Marlington Local School District, prior to assuming administrative duties in the Osnaburg Local School District.

If the answer to such question is in the affirmative, the second aspect to be considered is whether such cloak of tenure transferred with Mr. McIntosh to his Osnaburg position even though by the Amended Agreed Stipulation of Facts recites that at no time did he actually execute or hold a teaching contract with Osnaburg Local in addition to his administrative contract.

If the answer to this second query is in the affirmative, can Mr. McIntosh, since his contract as principal has been terminated, replace or "bump" an existing teacher without tenure in his area of certification.

Of course, if the Court does not find that he possessed tenure in Marlington Local, no determination must be made of the remaining two issues.

The facts are agreed that Mr. McIntosh was issued and executed limited teaching contracts pursuant to R.C. 3319.11 in the Marlington Local School District for the 1971-1972 through 1975-1976 school years.

*Appendix E*

Also, it is agreed that at a regular meeting of April 8, 1975, such Marlington Local Board of Education voted to grant him a continuing contract of employment (tenure).

There is no evidence that a written contract of tenure was submitted to Mr. McIntosh for signature or executed by him.

It is further agreed that on June 10, 1975, the Marlington Board voted to grant a one-year administrative contract as assistant principal.

R.C. 3319.08 provides in part:

> If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not void such employment contract.

There are also references in R.C. 3319.11 which require a teacher to give written notice of non-acceptance of an offered contract before June 1 following such offer or the teacher is presumed to accept the same.

It is therefore obvious, in the absence of evidence of written rejection, that Mr. McIntosh obtained a continuing teaching contract in the Marlington District.

The law is quite clear that a teacher with tenure does not lose such by subsequent acceptance of an administrative contract. R.C. §3319.11.

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As to the status of tenure accompanying Mr. McIntosh when he accepted the administrative position at Osnaburg, one must look to the decision of the Ohio Supreme Court in *State, Ex. Rel. Kelly v. Board of Education of the Clearcleek Local School District*, (1990) 52 Ohio St.3d 93 which held as follows:

> A certified teacher who has attained continuing service status in one school district, and who has served at least two years as an administrator in a second school district, is entitled to a continuing service contract as a teacher in the second school district if the administrative contract is not renewed. (R.C. 3319.01 and 3319.11, construed; *State, ex rel. Specht v. Painesville Twp. Local School Dist. Bd. of Edn. [1980], 63 Ohio St.2d 146, 17 O.O.3d 89, 407 N.E.2d 20, approved and followed.]*

Therefore, Mr. McIntosh is entitled to a continuing service contract in Osnaburg Local School District.

As the Court has continued to order payment of Mr. McIntosh as a teacher during the pendency of these actions, and he was entitled to be offered a teaching position upon non-renewal of his administrative contract, it continues such order to the end of the present school year, but does not order that he dislodge an existing teacher during the school year.

Under the Ohio Supreme Court decision referred to above, he is entitled and must be offered a continuing teaching contract by Osnaburg Local School District for the succeeding school year.

*Appendix E*

The Court further determines that, until the offering and acceptance of such continuing teaching contract he is not included within the present collective bargaining agreement and is, therefore, not presently by represented by the East Canton Education Association.

Costs taxed to Defendant.

s/ John F. Boggins
Judge John F. Boggins

## APPENDIX F — ORDER OF THE COURT OF COMMON PLEAS, STARK COUNTY, OHIO DATED AND FILED AUGUST 22, 1996

**IN THE COURT OF COMMON PLEAS**
**STARK COUNTY, OHIO**

**CASE NO: 1995CV02208-1**

**Judge James S. Gwin**

**EAST CANTON EDUCATION ASSOCIATION**

**Plaintiff.**

**vs.**

**JOHN R. MCINTOSH, Et al.,**

**Defendants.**

### ORDER

On July 26, 1996, Plaintiff East Canton Education Association moved this Court for summary judgment on all claims set forth in Defendant's Counter-Claims. On July 26, 1996, Third-Party Defendants, Mary Jo Slick, the Ohio Education Association and Sharon Griffith moved this Court for summary judgment as to all claims set forth in the Third-Party Plaintiff's Complaint. The Court grants these motions for the reasons that follow.

### I

On February 9, 1996, Defendant, John R. McIntosh, filed counterclaims against the Plaintiff East Canton Education

Association. McIntosh also filed a Third-Party complaint against Mary Jo Slick, Sharon Griffith, and the Ohio Education Association. Defendant McIntosh makes claims of defamation, tortuous interference with contract, and a breach of duty of fair representation.

Defendant McIntosh worked with the Marlington Local School District and the Defendant Osnaburg Local Board of Education from the 1966-1967 school year through the 1994-1995 school years. In March of 1995, the Defendant Osnaburg Local Board of Education Board adopted resolutions to not renew and/or end McIntosh's employment as Principal and/or teacher pursuant with Osnaburg. The parties dispute whether Defendant McIntosh had right to continued tenure with Defendant Osnaburg Local Board of Education.

Plaintiff Education Association is the collective bargaining unit that represents employees of the Osnaburg Local School District. Third Party Defendant, Sharon Griffith, is the Plaintiff Education Association President.[1] Third Party Defendant, Mary Jo Slick, is a Labor Relations Consultant with the Plaintiff East Canton Education Association. She gives Plaintiff East Canton Education Association labor consultations regarding its collective bargaining agreements.

The Osnaburg Local School District Board of Education employed McIntosh as the East Canton High School

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1. The Plaintiff Education Association is an affiliate of the Plaintiff East Canton Education Association which provides various local associations with labor relations consultants.

*Appendix F*

Assistant Principal and High School Principal from 1987 through March of 1995. On March 1, 1995, George McGuire, Superintendent for Osnaburg Local School District told McIntosh that he recommended McIntosh not be renewed for the following school years.

On March 10, 1995, Superintendent McGuire gave McIntosh notice that he would recommend that McIntosh be suspended and/or fired for "immorality," "student safety," and "condoning and/or promoting student unrest at your building for the purpose of advancing your personal employment concerns, resulting in an unconscionable risk of physical harm to students and significant disruption of academic activities."

Also on March 10, 1995, Third-Party Defendants Slick and Sharon Griffith[2] attended a meeting and recommended that Plaintiff East Canton Education Association issue a neutral statement that it supported the statutory process of "nonrenewing a principal's contract." The Plaintiff East Canton Education Association issued a statement that only supported the use of a due process procedure. Slick explained:

> "The position of the [ECEA] was not that the Board should or should not have nonrenewed/ terminated Mr. McIntosh. Rather the [ECEA] is supporting the Board of Education in that they 'followed the process'. . . ."

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2. Griffith is the President of Plaintiff East Canton Education Association.

Later, Griffith read a statement written by Third-Party Defendants Slick at a March 13, 1995, public hearing. In part, the statement said

> "It is with great sadness that the staff here tonight felt it necessary to take the unusual step of publicly entering this debate. Let there be no doubt, the ECEA supports the recommendation of the Superintendent and urges this Board to do the same . . ."
>
> "It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district."

**II**

Plaintiff East Canton Education Association says that the State Employment Relations Board has exclusive jurisdiction to decide issues involving the terms and conditions of employment found in unfair labor practice charges. In *Franklin County Law Enforcement Association v. Fraternal Order of Police, City Lodge No. 9* (1991), 59 Ohio St.3d 167, the Supreme Court stated the general rule:

> In short, R.C. Chapter 4117 has created a series of new rights and set forth the remedies and procedures to be applied regarding those rights. Pursuant to Fannan and Fletcher, supra, those remedies and procedures are exclusive. As indicated above, the aforementioned procedures created in R.C. Chapter 4117 do not provide for the filing of a private action in the common pleas

> court. Accordingly, we hold that SERB has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117.

In *Gallant v. Toledo Pub. Schools* (1992), 84 Ohio App.3d 378 the Court held that the State Employment Relations Board ("SERB"), rather than court of common pleas, had subject matter jurisdiction over elementary school teacher's claim of breach of duty of fair representation.)

Ohio R.C. 4117.11 requires employee organizations to fairly represent employees:

> (B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:
>
> * * *
>
> (6) Fail to fairly represent all public employees in a bargaining unit;

In *East Cleveland v. East Cleveland Firefighters Local 500, IAFF* (1994), 70 Ohio St.3d 125, the Ohio Supreme said SERB has exclusive jurisdiction if one of the party filed charges with SERB alleging an unfair labor practice under R.C. 4117.11 or the conduct involved is an unfair labor practice specifically enumerated in R.C. 4117.11.[3] In this,

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3. In *East Cleveland*, the Court stated:

> In our view, exclusive jurisdiction to resolve charges of unfair labor practices is vested in SERB in two

(Cont'd)

*Appendix F*

Ohio does not follow the Federal rule that gives courts jurisdiction to hear fair representation cases that are also unfair labor practices, *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962).[4]

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(Cont'd)

> general areas: (1) where one of the parties files charges with SERB alleging an unfair labor practice under R.C. 4117.11; or (2) a complaint brought before the court of common pleas alleges conduct that constitutes an unfair labor practice specifically enumerated in R.C. 4117.11, and the trial court therefore dismisses the complaint for lack of subject-matter jurisdiction.

4. In *Breininger v. Sheet Metal Workers Intern. Ass'n Local Union No. 6*, (1989) 493 U.S. 67, the Court described the federal rule:

> Although as general rule, neither state nor federal courts possess jurisdiction over claims based on activity that is arguably subject to unfair labor practice provisions of National Labor Relations Act, preemption rule does not extend to deprive district court of jurisdiction over suit alleging breach of duty of fair representation. National Labor Relations Act, Secs. 1 et seq., 7, 8, 8(a)(3), (b), (b)(1)(A), (b)(2), as amended, 29 U.S.C.A. Secs. 151 et seq., 157, 158, 158(a)(3), (b), (b)(1)(A), (b)(2).

*Breininger* followed the rule announced in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In *Vaca* the Court found jurisdiction to hear unfair representation suits. Labor organizations have a statutory duty of fair representation under the National Labor Relations Act to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

*Appendix F*

Defendant McIntosh admits that SERB typically has exclusive jurisdiction over fair representation cases.[5] Nevertheless, Defendant McIntosh argues that Plaintiff East Canton Education Association denies a duty to represent McIntosh. McIntosh claims this would make unfair representation proceedings futile.[6]

This argument does not persuade. Defendant McIntosh is correct that Plaintiff East Canton Education Association would deny a duty to represent him. Nevertheless, SERB has power to independently decide this. Nothing shows that unfair labor practice proceedings would be futile.

The Court finds it is without jurisdiction to hear Defendant McIntosh's claim that Plaintiff East Canton Education Association unfairly represented him. The Court gives Plaintiff East Canton Education Association summary judgment as to this claim.

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5. Defendant McIntosh had duty to file any unfair labor practice charge within ninety days. Ohio R.C. 4117.12, says, in part:

> The board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board, * * *

6. Defendant McIntosh argues:

> Therefore, under the particular facts of this case, it would have been futile for McIntosh to file an unfair labor practice charge pursuant to R.C. §4117 when it was the ECEA who initiated the instant lawsuit against McIntosh claiming he was not a tenured teacher or a member of the bargaining unit.

*Appendix F*

**III**

Third-Party Defendants Slick and Griffith move for summary judgment as to the claims of individual liability as to them. They say that we may not hold agents of a union responsible in their individual capacity for union actions.

Under Ohio law and the Labor Management Relations Act, agents of a union are not liable in their individual capacity for actions done in furtherance of their union activities. *Sellers v. Doe*, 99 Ohio App.3d 249, 252 (1994). In *Complete Auto Transit, Inc. v. Reis*, (1981) 451 U.S. 401, the U.S. Supreme Court reviewed a similar federal statute, and held that Section 301 of the Labor Management Relations Act does not sanction damages actions against individual employees, whether or not their union participated in or authorized their action.

The Plaintiff East Canton Education Association is an unincorporated association. As such, Ohio has protected it, R.C. 1745.02. That Section says:

> All assets, property, funds, and any right or interest, at law or in equity, of such unincorporated association shall be subject to judgment, execution and other process. A money judgment against such unincorporated association *shall be enforced only against the association as an entity and shall not be enforceable against the property of an individual member* of such association.

See *Miazga v. International Union of Operating Engineers, AFL-CIO, Local 18* (1964), 2 Ohio App.2d 153 ("Union

member could maintain libel suit against union under unincorporated association statute but could not maintain claim against union officers as officers thereunder.)

Defendant McIntosh says that Third-Party Defendants Slick and Griffith acted beyond the scope of their authority. He says they acted beyond the authority given them by the members of the East Canton Education Association. Still, they acted within the scope of their employment. In *Posin v. A. B. C. Motor Court Hotel, Inc.* (1976) 45 Ohio St.2d 271, the Court described the rule:

> It is recognized, however, that not every deviation from the strict course of duty is a departure such as will relieve a master of liability for the acts of a servant. The fact that a servant, while performing his duty to his master, incidentally does something for himself or a third person, does not automatically relieve the master from liablity for negligence which causes injury to another. *Loughead Co. v. Hollenkamp* (1924), 3 Ohio Law Abst. 558.
>
> To server the servant from the scope of his employment, the act complained of must be such a divergence from his regular duties that its very character severs the relationship of master and servant. *Amstutz v. Prudential Ins. Co.* (1940), 136 Ohio St. 404. See, generally, 36 Ohio Jurisprudence 2d, Master and Servant, Section 386 et seq.;

Defendant McIntosh makes no showing that Third-Party Defendants Slick or Griffith so departed from their responsibilities as to change the character of their actions.

The Ohio Education Association employs Third-Party Defendants Slick. The Court finds that Slick and Griffith are protected as agents of the East Canton Education Association. They fall within the protective rule set forth in Atkinson, and McIntosh cannot hold Ms. Slick personally liable for her activities. The Court finds that Slick and Griffith are not liable in their individual capacities.

**IV**

Third-Party Defendants Slick, the Ohio Education Association; and Sharon Griffith move this Court for summary judgment as to Defendant McIntosh's claims for defamation.

Generally, in a defamation action, the plaintiff has the burden of proving by clear and convincing evidence that the defendant made a false, defamatory statement of fact regarding the plaintiff and that the defendant was at least negligent in publishing it. *Lansdowne v. Beacon Journal Pub. Co.* (1987), 32 Ohio St.3d 176, 178-180. The United States Supreme Court has held that the First Amendment requires that the plaintiff show greater fault where a public figure is involved. If a public figure is involved, the plaintiff must show that the defamatory statement was "made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 279-280.

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Defendant McIntosh says Slick and Griffith spoke at a March 13, 1995, public meeting. McIntosh says these statements included:

1) "I am here tonight specifically authorized by our membership to address you on their behalf and to express their views on the recent events in our district."

2) "Let there be no doubt, the ECEA supports the recommendation of the superintendent and urges this Board to do the same."

3) "When discussing the Board's charge that he had problems with disciplining students, he was quoted in the newspaper as blaming 'weak teachers.' "

4) "I have personally reviewed every evaluation of each high school teacher. There is not one criticism of any of the teachers, by Mr. McIntosh or any other evaluator, regarding student discipline."

5) "How could this Board or community ever expect our staff to work for Mr. McIntosh as their supervisor or even with him as a fellow teacher after such a self-serving attack?"

6) "It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district."

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Defendant McIntosh was a public figure when they made the alleged defamatory statement. As such, McIntosh must show actual malice.[7]

In Ohio, we protect expressions of opinion from a claim of defamation. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America*, (1983), 6 Ohio St.3d 369. Also, statements susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America*, (1983), 6 Ohio St.3d 369. Equally important, defamation only occurs when a plaintiff shows a false publication causing injury to a person's reputation, or exposing him to public hatred, contempt, ridicule, shame or disgrace, or affecting him adversely in his trade or business.

As described, Defendants said "Let there be no doubt, the ECEA supports the recommendation of the

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7. In *Dale v. Ohio Civil Service Employees Ass'n*, (1991) 57 Ohio St.3d 112, the Court also required actual malice in defamation suits arising from a public sector labor dispute:

> Accordingly, we conclude that the public policies underlying R.C. Chapter 4117 would be served by applying the Linn rule to public-sector labor disputes. We therefore hold that the "actual malice" standard of *New York Times v. Sullivan* applies to defamation claims founded upon statements made by and about participants in a public-sector labor dispute, such as that involved in the instant case.

superintendent and urges this Board to do the same." But this is opinion, not fact and in no way subjected Defendant McIntosh to public hatred, contempt, ridicule, shame or disgrace.

Defendant McIntosh says that Third-party Defendants said: "It is just plain wrong for one person to exploit students and to allow a community to be torn apart with the circus-like atmosphere that has existed in this district." Defendant McIntosh says this implies he was guilty of immorality. However, in context, the Court finds that the statement refers to the claim that McIntosh allowed students to become embroiled in the administrative dispute. As related above, statements susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted.

Finally, the Court finds the other statements either opinion or not tending to subject Defendant McIntosh to contempt, ridicule, shame or disgrace. Even more important, the Court finds no evidence of malice.

## V

Third-party Defendants ask for judgment on Defendant McIntosh's claim for tortious interference with contract. In *Kenty v. TransAmerica Premium Insurance Co.*, (1995), 72 Ohio St.3d 415, the Court said intentional interference with contract required (1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages.

*Appendix F*

The parties dispute whether Defendant McIntosh had a contract requiring Defendant Osnaburg Local Board of Education to employ him as a teacher. The Court has evidence that Defendant Plaintiff East Canton Education Association had knowledge of the claim of contract.[8] But, the Court finds some evidence that the Plaintiff East Canton Education Association sought Defendant Osnaburg Local Board of Education to break the claimed contract.[9] Nevertheless, the Court finds no evidence to support the claim that Plaintiff East Canton Education Association did not have justification to make such statements. In Ohio, there is no liability for tortious interference with potential sales contract, where the defendant acts to discourage the prospective contract which he believes in good faith to impair his own legally protected interests. *Bell v. Le-Ge, Inc.*, (1985) 20 Ohio App.3d 127; *Pearse v. McDonald's Systems of Ohio, Inc.*, (1975) 47 Ohio App.2d 20 (One is privileged to purposely cause another not to perform a contract with a third person where he in good faith is asserting a legally

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8. In a March 28, 1995, letter Plaintiff East Canton Education Association representative Slick wrote:

> "Also, since Mr. McIntosh had tenure in the Marlington School District prior to coming to East Canton as a principal, if the Board had only nonrenewed him, he would have bumped one of our teachers and caused a layoff."

9. Plaintiff East Canton Education Association representatives spoke to the Defendant Osnaburg Local Board of Education and supported firing McIntosh. The union said teachers could never work with McIntosh and McIntosh "exploited students."

protected interest of his own, which he believes will be impaired or destroyed by the performance of the contract.)

As representative of teachers, Plaintiff East Canton Education Association had right to make statements affecting its members interest. As such, the Plaintiff East Canton Education Association had justification for making statements about the suitability of retaining Defendant McIntosh. The Court grants Third-party defendants motions for summary judgment as to Defendant McIntosh's claims for tortious interference with contract.

For these reasons, the Court grants Third-Party Defendants, Mary Jo Slick, the Ohio Education Association and Sharon Griffith's motion for summary judgment. The Court grants summary judgment as to all claims of defamation. The Court grants summary judgment as to all claims of lack of fair representation. The Court grants summary judgment as to all claims of tortious interference with contract.

IT IS ORDERED, ADJUDGED AND DECREED.

s/ James S. Gwin
Judge James S. Gwin

## APPENDIX G — RECONSIDERATION ENTRY OF THE SUPREME COURT OF OHIO DENYING MOTION FOR RECONSIDERATION DATED AND FILED JUNE 30, 1999

**THE SUPREME COURT OF OHIO**

1999 TERM

Case No. 97-2039

(Stark County)

East Canton Education Association,

Appellant,

v.

John R. McIntosh (et al.),

Appellee.

[Osnaburg Local School District
Board of Education et al.,

Appellants.]

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 96CA0293)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

## APPENDIX H — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. Amend. I:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. Amend. XIV, Sec. 1:**

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

**29 U.S.C. § 185(b):**

> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom

it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.